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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 725

VANCE JULIAN, TRUSTEE IN BANKRUPTCY OF ROBY C. WOODY, d/b/a WOODY MOTOR COMPANY, BANKRUPT,
Petitioner,

vs.

THE FARMERS BANK OF CLINTON, MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Vance Julian, Trustee in Bankruptcy of Roby C. Woody, d/b/a Woody Motor Company, Bankrupt, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit rendered in appeal numbered

18588 wherein The Farmers Bank of Clinton, Missouri, was Appellant and petitioner here was Appellee, which judgment reversed in part, modified and remanded for further proceedings consistent with its opinion, the judgment of the United States District Court for the Western District of Missouri which affirmed the order of the Referee in Bankruptcy.

The Certified Transcript of Record (Volumes I, II and III) for use in the Supreme Court of the United States on Application for Writ of Certiorari, forwarded to the Clerk of this court on September 18, 1967, is referenced infra thus (Vol. ....., Tr. .....).

OPINIONS BELOW

The Referee's Order On Trustee's Objections To Allowance Of Claim Of Farmers Bank And On Petition For Order To Show Cause Directed To Said Bank, filed June 10, 1964 (set out in Vol. I, Tr. 65-71) is appended hereto as Appendix A (pp. A54 to A62); the District Court's Memorandum Opinion And Decision On Four Petitions For Review, filed January 5, 1966 (set out in Vol. II, Tr. 16-40) is appended hereto as Appendix A (pp. A28 to A53); the Opinion and Judgment of the Court of Appeals dated August 8, 1967 (set out in Vol. III, Tr. 61-89) has not been officially reported and a copy is appended hereto as Appendix A (pp. A1 to A27).

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1967 (Vol. III, Tr. 89). Petition For Rehearing or In The Alternature To Transfer To The Court En

Banc, filed August 22, 1967 (Vol. III, Tr. 90-104), was denied by the Court of Appeals on September 5, 1967 (Vol. III, Tr. 105). Appellee's Motion To Stay Issuance Of Mandate was granted and issuance of mandate stayed for a period of 30 days from and after September 11, 1967 (Vol. III, Tr. 106). This court's jurisdiction is invoked under 28 U.S.C.A. Section 1254 and 11 U.S.C.A. Section 47.

QUESTIONS PRESENTED

1(a). Did the Court of Appeals err and misapply the *clearly erroneous* rule stated in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, which it used as the Standard Of Review (Court of Appeals opinion pp. 7, 8; Vol. III, Tr. 61-88; Appendix A, pp. A7-A8) in the instant case when it denied Appellee's Motion To Vacate Setting (Vol. III, Tr. 1-59) and declined to hold the instant appeal until the *entire evidence* presented at the joint hearing and considered by the Referee and the District Court could also be presented to and considered by the Court of Appeals as stated and supported in said motion?

(b) Can the Court of Appeals by applying and using the *clearly erroneous* rule stated in the *Gypsum* case to *less than the entire evidence*, as the Standard Of Review, displace the Referee whose duty it is to hear the testimony, observe the witnesses, weigh the evidence and find the ultimate facts accordingly and can it disregard: General Order in Bankruptcy No. 47 (11 U.S.C.A. following Sec. 53), Federal Rule Of Civil Procedure No. 52a (28 U.S.C.A. Supp.) and cases cited infra; and the provisions of Sections 60a, b and c, 67 (6) and (7) and 70 a and c, paragraphs 1 and 2 of the Bankruptcy Act (11 U.S.C.A. 96, 107,

110), and Section 443.460, Vernon's Annotated Missouri Statutes and cases cited infra?

2(a). With respect to the November 22, 1957, mortgage (Vol. I, Tr. 28, 29) discussed in Court of Appeals opinion (Vol. III, Tr. 62, 63, 69-74; Appendix A, pp. A2-A3, A9-A14) did the Court of Appeals err in ruling that oral agreements made between the parties prior to bankruptcy bound the trustee *after* the advent of bankruptcy?

(b) Did appellant by its conduct in permitting said mortgage to remain past due and lie dormant without enforcing the terms thereof and without timely asserting its mortgage lien, from May 22, 1958, before bankruptcy, until January 19, 1960, *after* bankruptcy actually subordinate itself and was the Referee justified in subordinating appellant's mortgage and rights to the rights of creditors under the facts stated infra?

(c) Has appellant preserved any recognizable rights or liens to after-acquired property acquired when expanding and making replacements under Section 60 a(6) of the Bankruptcy Act (11 U.S.C.A. Sec. 96)?

(d) Has appellant waived its mortgage lien and was it estopped to claim a mortgage lien by its conduct and by its consent to the sale of bankrupt's property free and clear of liens without having secured the order of the Referee, or the United States District Court, transferring said lien rights, if any, to the fund realized from the sale under the facts stated infra?

3. With respect to the May and June, 1959 mortgage loans (Vol. I, Tr. 31, 34):

(a) Can appellant reap benefit from its own fraudulent conduct in agreeing to hold secret and not file said mortgages as required by Section 443.460 of the Missouri

Statutes by *electing* to credit the June 30, 1959, setoff of $9,733.88 as a payment on said fraudulent mortgages in which appellant itself participated?

(b) When on the night of June 30, 1959 (the day of said setoff), bankrupt, just to help appellant bank, voluntarily gave appellant a chattel mortgage on 15 of his free and clear cars without consideration to cover the unpaid balance of the June, 1959 mortgage loan, which mortgage was dated July 1 and filed July 2, 1959 (Vol. I, Tr. 39, 40), and when several days thereafter, on July 4, a holiday, or on July 5, Sunday, after business hours between 6 p. m. and midnight, appellant was permitted to enter and remove said 15 cars from bankrupt's premises, by such conduct, subsequent to the June 30, 1959 setoff of $9,733.88, did bankrupt and appellant characterize and reflect the animus which prompted said setoff and show and establish the original purpose of fraud beginning with and incident to (a) the obtaining of said May and June, 1959 unfiled mortgages, (b) the taking of the $9,733.88 set-off, and (c) the voluntary giving of said July 1, 1959 mortgage on 15 free and clear cars?

(c) Can the Court of Appeals rule that Appellant had no *reasonable* cause to believe bankrupt was insolvent, merely from Appellant's testimony that it relied on bankrupt's false financial statement in the face of appellant's agreements to keep said mortgages secret and to withhold the same from record in fraud of the rights of creditors and in violation of Section 443.460 of Missouri state law, or was appellant put upon inquiry by these and other facts stated infra and thereby bound by what it would have discovered upon inquiry and thus appellant had the *reasonable cause*, as ruled by the Referee and affirmed by the District Court, under Section 60(b) of the Bankruptcy Act?

(d) Did the Court of Appeals err in ruling that appellant could set off the amount due it under said fraudulent and void mortgage loans against the voidable preferences which appellant received from bankrupt contrary to Section 60(c) of the Bankruptcy Act?

STATUTES AND RULES INVOLVED

General Order in Bankruptcy No. 47 (11 U.S.C.A. following Sec. 53)—Reports of Referees and Special Masters, provides:

> "Unless otherwise directed in the order of reference the report of the referee * * * shall set forth his findings of fact and conclusion of law, and the judge shall accept his finding of fact unless clearly erroneous."

General Order in Bankruptcy No. 37 (11 U.S.C.A. following Sec. 53)—General Provisions, provides:

> "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall in so far as they are not inconsistent with the Act or with these general orders, be followed as near as may be."

Federal Rules of Civil Procedure, Rule 52a (28 U.S.C.A. Supp.)—Findings by the Court, provides:

> "In all actions tried upon facts without a jury * * *, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Section 60 of the Bankruptcy Act (11 U.S.C.A. 96 Supp.) —Preferred Creditors, provides:

Section (a):

"(1) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other of the same class."

"(2) For the purpose of subdivisions (a) and (b) of this section a transfer of property other than real property shall be deemed to have been made or suffered at the time it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could be superior to the rights of the transferee. * * *"

"(3) The provisions of paragraph (2) of this subsection shall apply whether or not there are or were creditors who might have obtained such liens upon the property other than real property transferred * * *."

"(6) The recognition of equitable liens where available means of perfecting legal liens have not been employed is declared to be contrary to the policy of this section. If a transfer is for security and if (A) applicable law requires a signed and delivered writing, or a delivery of possession, or a filing or recording, or other like overt action as a condition to its full validity against third persons other than a buyer in the ordinary course of trade claiming through or under the transferor and (B) such overt act has not been taken, and (C) such transfer results in the acquisition of only an equitable lien, then such transfer is not perfected within the meaning of paragraph (2)

of this subsection. Notwithstanding the first sentence of paragraph (2) of this subsection, it shall not suffice to perfect a transfer which creates an equitable lien as such is described in the first sentence of this paragraph, that it is made for a valuable consideration and that both parties intend to perfect it and that they take action sufficient to effect a transfer as against liens by legal or equitable proceedings on a simple contract * * * *And provided further,* that nothing in this paragraph shall be construed to be contrary to the provisions of paragraph (7) of this subsection."

"(7) Any provision in this subsection a to the contrary notwithstanding if the applicable law requires a transfer of property other than real property for or on account of a new or contemporaneous consideration to be perfected by recording delivery or otherwise, in order that no lien described in paragraph (2) of this subsection could become superior to the rights of the transferee therein, * * * the time of transfer shall be determined by the following rules: * * *

"II. * * * if such compliance is not had prior to the filing of the petition initiating a proceeding under this title, such transfer shall be deemed to have been made or suffered immediately before the filing of such petition."

Section (b)

"Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that debtor is insolvent."

Section (c)

"If a creditor has been preferred and afterward in good faith gives the debtor further credit without security of any kind for property which becomes a part

of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

Section 67 of the Bankruptcy Act (11 U.S.C.A., Sec. 107)—Liens and fraudulent transfers, provides:

Section (*d*) (*6*)

"A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this title, which is fraudulent under this subdivision against creditors of such debtor having claims provable under this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value * * *.

Section (*d*) (*7*)

"Nothing contained in this subdivision d shall be construed to validate a transfer which is voidable under section 96 of this title.

Section 70 of the Bankruptcy Act (11 U.S.C.A., Sec. 110)—Title to Property, provides:

"(a) The trustee of the estate of a bankrupt * * * upon his * * * appointment * * * and qualification shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, * * * to all of the following kinds of property wherever located * * * (4) property transferred by him in fraud of creditors; * * *."

"(c) * * * The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or no such creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied

against bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists."

* * *

"(e) (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor."

"(2) All property of the debtor affected by such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate * * *. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it * * *."

Section 443.460, Vernon's Ann. Missouri Statutes—Mortgages, etc., of personalty, invalid unless recorded— provides:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or *cestui que* trust or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage

or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, * * *; and such recorder shall endorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for inspection of all persons; and such mortgage or deed of trust, or copy thereof, may be so filed, although not acknowledged, and shall be as valid as though the instrument were fully spread upon the records of the county * * *; and such instrument, when acknowledged and recorded, or when the same or a copy thereof, shall have been filed, as above provided, shall thenceforth be notice of the contents thereof to all the world."

STATEMENT

1. Roby C. Woody, d/b/a Woody Motor Company, was adjudicated a bankrupt on July 14, 1959; petitioner Vance Julian became trustee of bankrupt's estate on September 29, 1959 (Vol. I, Tr. 1-6).

2. On January 19, 1960, appellant filed proof of claim for $6,000.00, as a secured creditor, under note and chattel mortgage dated November 22, 1957 (Vol. I, Tr. 15-17) in which the described security consisted chiefly of tools, machinery, equipment, shop furniture and fixtures * * * "now owned, or hereafter purchased during the life of this loan" * * * and "the increase thereof." (Vol. I, Tr. 28). On October 10, 1960, the trustee filed objections to the allowance of said claim and instituted turn-over proceeding against appellant (Vol. I, Tr. 17-22).

3. Concurrently with the turn-over proceedings against appellant, the trustee also filed turn-over proceedings against The First National Bank of Clinton, which with appellant were "local" banks, against 17 "local" people, and against Commercial Credit Corporation (called

C.C.C.). On May 28, 1964, the Referee entered turn-over orders directed to said "local" people and to C.C.C.; on June 10, 1964, the Referee entered turn-over orders directed to said "local" banks (Vol. I, Tr. 88).

4. On June 30, 1964, C.C.C. filed petition to review the turn-over order against it and on August 10, 1964, said "local" people and "local" banks filed petitions to review the respective turnover orders against them. On September 8, 1964, the Referee certified said four reviews to the United States District Court (Vol. I, Tr. 88).

5. On January 5, 1966, the District Court rendered its Memorandum Opinion and Decision on Four Petitions for Review (Vol. I, Tr. 16-39; Appendix A, pp. A29-A53) which confirmed the Referee with respect to his rulings against said "local" people and said "local" banks (Vol. II, Tr. pp. 16-25; Appendix A, pp. A35-A38), but recommitted the proceedings against C.C.C. to the Referee for compliance with Eighth Circuit rule which requires the Referee's findings of fact and conclusions of law to be set out in the Referee's order and not in the Referee's certificate on review (Memorandum Opinion and Decision, Part IV, Vol. II, Tr. pp. 25-39; Appendix A, pp. A39-A53).

6. The four turn-over proceedings were directed to bankrupt's action in diverting all of his assets away from his creditors at approximately the same time on the eve of bankruptcy to said "local" people, said "local" banks and to C.C.C. which action and the resultant turn-over proceedings were the subject of the joint hearing before the Referee on March 30, 1964, where all evidence common to all such transferees was applied to each to the extent applicable to each without the necessity of repetition. The largest part of the evidence presented at said joint hearing was presented in the C.C.C. turn-over proceedings which resulted in the Referee's order directing

C.C.C. to turn-over in excess of $100,000 to the Trustee. Appellee's Motion to Vacate Setting in the instant cause was directed to causing all evidence common to all such transferees to be considered by the Court of Appeals (Vol. III, Tr. 1-60). The parts of the C.C.C.'s evidence which are common and applicable to the instant case were not presented to the Court of Appeals.

7. On November 22, 1957, appellant made a $16,000.00 loan to bankrupt. To evidence and secure said loan, bankrupt gave appellant a Note and Chattel Mortgage which was filed for record on November 23, 1957; said mortgage loan became due on May 22, 1958 (Vol. I, Tr. 28, 29), at which time the unpaid balance thereon was $11,000.00. By oral agreement with appellant bankrupt made subsequent payments thereon until May 7, 1959, at which time the unpaid balance was $6,000.00 (Vol. I, Tr. 29, 23). No extension was endorsed on the note and no written extension agreement was made. When bankrupt stopped making payments on May 7, 1959, he told appellant "I couldn't meet the obligation and *we had others*". Bankrupt talked to appellant about long-term financing, discussed his financial condition with appellant; and testified that he told appellant that he (bankrupt) was doing a lot of expanding and needed additional cash at various times (Vol. I, Tr. 42); and stated that Appellant never came down (to bankrupt's place of business) and did not "make an audit of these assets that are described in that mortgage" (Vol. I, Tr. 43).

8. Appellant permitted the November 22, 1957, note and mortgage to remain past due and dormant after May 22, 1958, without enforcing the terms thereof and without timely asserting its mortgage lien, from May 22, 1958, when said mortgage loan became due until July 8, 1959, when C.C.C. seized *all* of bankrupt's property in a replevin ac-

tion (Vol. II, Tr. p. 40, Par. 2); from July 8 until July 13, 1959, the date of bankruptcy (Vol. I, Tr. 6) and *after bankruptcy* until September 29, 1959, when the trustee recovered the replevined property; from September 29 until November 5, 1959, the date of the Order for Sale of bankrupt's property (Vol. II, Tr. 12) secured with the cooperation and consent of appellant's attorney (Vol. II, Tr. 8-13) under a petition which directly challenged the validity of appellant's said mortgage (Vol. II, Tr. 11, par. 5); from November 5 until November 9, 1959, when said property was sold and delivered to the purchaser free and clear of all liens without appellant asserting any lien rights thereto or appellant having secured the Referee's or the District Court's order transferring appellant's lien rights, if any, to the fund received from said sale; and from November 9, 1959 until January 19, 1960, when appellant first asserted a mortgage lien under said November 22, 1957, mortgage by filing the aforementioned claim as a secured creditor on said date, as stated supra (Vol. I, Tr. 15-17).

9. As to what constituted the collateral for the November, 1957, mortgage loan, appellant's evidence is that bankrupt had the latest type of equipment, had good fixtures and shop equipment and was adding to them through the years (Vol. I, Tr. 61).

10. It is stipulated (both parties reserving the right to offer additional evidence); (a) that the May 12, 1959, mortgage loan for $12,000.00, due May 1, 1959, was not recorded; that the cash for this loan went into bankrupt's bank account; that this loan was in addition to the November, 1957, mortgage loan and that said note was cancelled (paid) (Vol. I, Tr. 23, par. 2, also pages 30-32); (b) that the June 3, 1959, mortgage loan for $16,000.00, due on demand, was not recorded; that $3,000.00 of said loan was applied to pay the unpaid balance still due on the

May, 1959 loan and $13,000.00 was deposited in bankrupt's bank account; that this loan was in addition to the November, 1957 mortgage loan (Vol. I, Tr. 23, par. 3, also pages 33-35).

11. Bankrupt's testimony with respect to said May and June, 1959 mortgage loans is: that he had a discussion with appellant's president Finks when he made said loans with respect to his condition and need for capital and told Finks that he (bankrupt) was in a tight spot and needed a long-time loan; that Finks said the bank couldn't go on a long-time loan so bankrupt started negotiating with C.C.C. on June 22, 1959, by asking for an appointment (Vol. I, Tr. 50); that C.C.C.'s Mourning was to come down to Clinton on June 30; that before agreeing to said date, bankrupt told Finks that he (bankrupt) had this date and Finks said he would go along with bankrupt until that date; that when Mourning came down on June 30, he and C.C.C.'s Hughes made an inventory of bankrupt's free and clear cars; that bankrupt and Mourning had started negotiating a loan when Mourning had a (telephone) call that appellant bank had taken bankrupt's bank account and returned bankrupt's checks; that Mourning and Finks then had a conversation at bankrupt's place of business (Vol. I, Tr. 51); that after the bank had taken bankrupt's bank account and bankrupt "seen what was happening", bankrupt took what car titles he could and went up to Finks and told him that it looked like C.C.C. was putting on pressure and were going to close the place and that he (bankrupt) would like to straighten out some paper (the May and June, 1959 mortgages) because appellant didn't have any car titles or anything filed and bankrupt knew that said mortgages "wasn't too valuable" and on July 1 bankrupt gave appellant the July 1, 1959 note and mortgage due on demand for $6,266.12 (balance remaining

on the June 3, 1959, loan after crediting $9,733.88 setoff) which appellant filed on July 2, 1959, and said car titles to help the bank; that said July 1 demand mortgage provided that "This is a continuation of the chattel mortgage dated June 3, 1959" (Vol. I, Tr. 52, 39).

12. On cross-examination bankrupt stated: that he told Finks that he (bankrupt) was over-expanded and that this (May, 1959 loan) wouldn't solve all his problems but it would help; that the May loan was a stop-gap loan until he could get long-term financing; that in June, bankrupt made the $16,000.00 demand loan, the long-term loan hadn't come through yet; that bankrupt was keeping Finks informed as to his progress in negotiating this (long-term) loan with C.C.C. (Vol. I, Tr. 54). Said May and June, 1959 mortgage loans carry the notation "This note was not filed. We held car titles" (Vol. I, Tr. 32, 35).

13. On re-direct examination bankrupt testified: that he didn't get any money for the July 1, 1959 mortgage; that after he gave appellant the July 1, 1959 demand mortgage (filed July 2, 1959), appellant picked up those 15 cars in the evening from five or six to about midnight on July 4 or 5, 1959, which appellant sold for $4,500.00 and credited that amount to bankrupt's loan account (Vol. I, Tr. 56, 57, also p. 41).

14. Appellant's president Finks testified: that the November 22, 1957 loan secured all future indebtedness between appellant and bankrupt (Vol. I, Tr. 58) which included the May and June, 1959, unrecorded mortgage loans; that bankrupt received $13,000.00 additional cash from the June 3, 1959, mortgage loan; that the purpose or reason for making the May and June, 1959, loans was to carry bankrupt over a very short period of time while he was getting a loan which bankrupt told Finks was coming from C.I.T. or C.C.C. (Vol. I, Tr. 59); that about June 30, 1959, appel-

lant understood C.C.C. would advance bankrupt the money which would pay appellant's loans in full; that Finks was called to bankrupt's office on June 30, and it appeared to Finks that this money was not forthcoming from C.C.C.; that Finks went back to the bank and on June 30 made a $9,733.88 setoff against bankrupt's bank account (Vol. I, Tr. 60-62); that after the setoff, the balance due on the June 3, 1959, $16,000.00 mortgage loan was $6,266.12, so on July 1, 1959, appellant took another note and mortgage for $6,266.12 on 15 free and clear cars, due on demand (Vol. I, Tr. 39-41), recorded this mortgage, and several days later took possession of these 15 cars which it sold for $4,500.00 (Vol. I, Tr. 60-62); that there was no reason why the November, 1957, loan on bankrupt fixtures equipment etc. was not paid as scheduled except that appellant just kept it and left its collateral the same as it had been; that bankrupt always kept good equipment for his shop, the latest type, and valued it at considerable more than he did his inventory at different times in his statements (Vol. I, Tr. 61, 62); that when bankrupt executed this July note and when bankruptcy occurred, bankrupt still had all these fixtures and actually was adding to them through the years (Vol. I, Tr. 61).

15. On cross-examination Finks stated: that the reason appellant didn't record the May 12 and June 3 mortgages was because it felt that it had ample security in its 1957 loan to cover these additional advances and in addition bankrupt continually told Finks that he (bankrupt) had the money coming from C.I.T. and C.C.C. which would pay appellant in full, including its 1957 loan; that when appellant got the July 1st mortgage it gave bankrupt no money; that two or three days later appellant's buyer went down and picked up those cars which were in appellant's possession and which appellant had sold for $4,500.00 (Vol.

I, Tr. 62); that on June 30, 1959, appellant charged off $9,733.88 against bankrupt's bank account (Vol. I, Tr. 63).

16. Bankrupt recalled giving appellant a financial statement in March of 1959, before the May $12,000.00 loan was made which indicated bankrupt's net worth to be approximately $113,000.00 (Vol. I, Tr. 53, also p. 37); appellant's Finks stated that bankrupt furnished him a financial statement showing a very large net worth; that he (Finks) did not at any time have cause to believe that bankrupt's financial statement wasn't correct; and that he (Finks) did not, at any time have cause to believe bankrupt was, in fact, insolvent; and that when appellant made the May and June loans, it gave bankrupt cash at that time (Vol. I, Tr. 59).

17. The following are some of the facts common to all transferees involved in the four turn-over proceedings, jointly heard as stated supra:

1. That as of December 31, 1957, bankrupt's business was insolvent by the amount of $37,990.10; as of December 31, 1958, it was insolvent by the amount of $126,933.73; and as of May 31, 1959 (approximately 6 weeks prior to bankruptcy) it was insolvent by $149.072.73. (Stipulation as to transferees, 17 "local" Clinton people filed March 30, 1964, par. 4; Stipulation as to transferee C.C.C. filed February 27, 1964, par. 16) (Vol. II, Tr. 39).

2. That on June 29 and 30, 1959, bankrupt gave C.C.C. 27 checks drawn on appellant's bank to cover his shortage for cars sold without remittance to C.C.C. in the sum of $53,577.89 and for unremitted collections from customers collected on behalf of C.C.C. totalling $1,916.06; appellant returned all of said checks to C.C.C. unpaid. (Stipulation as to transferee C.C.C. filed February 27, 1964, pars. 3, 10, 15, and Exhibit "I") (Vol. II, Tr. 40).

3. That on July 8, 1959, C.C.C. foreclosed on *its* July 1, 1959, demand chattel mortgage and all other of bankrupt's mortgages which it then held "by a replevin suit filed in the United States District Court, numbered there 12427, in which proceeding the United States Marshal seized the property covered by said mortgages under a writ of replevin issued by said court and delivered same to C.C.C. at Clinton. C.C.C. removed same from bankrupt's place of business." (Stipulation as to transferee C.C.C. filed February 27, 1964, par. 6) (Vol. II, Tr. 40).

4. That on July 1, 1959, C.C.C. left its employee, Hughes, in Clinton, who stayed in and around bankrupt's business during business hours until July 9, 1959, "to protect the interests of C.C.C. with respect to sales by bankrupt of any cars upon which it held mortgages. Hughes collected the proceeds of certain sales ($12,437.45) for this purpose. (Stipulation as to transferee C.C.C. filed February 27, 1964, pars. 4, 12) (Vol. II, Tr. 40).

5. That on July 1, 1959, bankrupt owed approximately $273,000.00 * * * that bankrupt's liabilities ($273,000.00) exceeded bankrupt's assets ($163,000.00) by approximately $120,0000.00 (Supplemental Stipulation as to transferee C.C.C. filed March 17, 1966, page 42).

6. That the record (in the bankruptcy proceeding) shows that 77 claims (including claim filed by C.C.C. and appellant) were filed in said proceeding; * * * that of the 77 general claims and 35 priority claims * * * at least 20 of said general claims show that said general creditors extended credit to bankrupt between June 30 and July 13, 1959, and that 22 of said priority claims were for services rendered to the bankrupt between July 3 and July 11, 1959 (Supplemental Stipulation as to transferee C.C.C. filed March 17, 1966, par. 13, pages 63, 64).

ARGUMENTS

I.

As to Questions Presented Numbered 1 (a) and (b).

General Order in Bankruptcy No. 37 (11 U.S.C.A. following Section 53) makes Federal Rules of Civil Procedure applicable to bankruptcy proceedings "in so far as not inconsistent with the Act". Federal Rule of Civil Procedure No. 52 (a), applicable to bankruptcy proceedings, states that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses". Likewise General Order Bankruptcy No. 47 (citation supra) states that unless otherwise directed in the order of reference the Referee "shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous".

In its opinion (Vol. III, Tr. 67, 68, Appendix A, pp. A7, A8) the Court of Appeals considers, as the only Standard of Review applicable in this matter, the *clearly erroneous* rule stated in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 365, that: "A finding is clearly erroneous when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm convictions that a mistake has been committed" (Italics furnished); it erroneously applied the Gypsum *clearly erroneous* rule, for a first time, to *less than the entire evidence*, when it denied Appellee's Motion to Vacate Setting of the Appeal (Vol. III, Tr. 1-59, 60) and declined to hold-up and reset the hearing on appeal until the required *entire evidence*, as the same was presented

at the joint hearing and was considered by the Referee and District Court, could also be presented to and considered by the Court of Appeals as stated and supported in said motion.

Appellant could suffer no injustice from the granting of Appellee's said motion since Appellant already had and was using the funds which Appellee was seeking to recover, but injustice was suffered by Appellee both from the denial of said motion and from the error of the Court of Appeals in applying the Gypsum rule to a partial record instead of the *entire evidence* as presented in this and the three other related causes.

Without the *entire evidence* the Court of Appeals could not determine "from *the entire evidence*" whether the Referee's findings at bar are clearly erroneous without considering other standards of review established by the cases interpreting the aforementioned rules which the Court of Appeals completely disregarded and limited itself to the one Standard of Review stated in the Gypsum case.

The courts have discussed this question. In *Morris Plan Industrial Bank* v. *Henderson*, 131 F.2d 975, 976, Pars. 1, 3 (C.A. 2), Judge Learned Hand spoke thus:

> "Everyone forms his conclusions from testimony, not only from the words which he hears the witnesses utter, but from their appearance when they utter them; and the added weight to be attached to a referee's findings or a judge's (if he sees the witnesses) depends upon the fact that he has in effect had evidence before him which cold print does not preserve. So far, therefore, as the words themselves leave any latitude, the referee's conclusions ought to prevail because we cannot appraise the cogency of the lost evidence. In the end, as we have often said, the responsibility for the right conclusion remains the judge's

> as indeed it does ours (citing); but we have again and again held that except in plain cases he should accept the referee's findings (citing). We, therefore, hold that the question is the same in this court as it was in the district court."

To the same effect is *In re Skerentny*, 199 F.2d 488, 492 (C.A. 7).

The chain of circumstances set out in the statement, supra, and those set out, infra, give importance to *In re Fredman*, 164 Fed. 131, where the court stated:

> "Louis Fredman and E. M. Reiselbach testified unequivocally that they had no knowledge of the financial condition of the bankrupt at any time. The bankrupt corroborated them in this regard, and there was slight positive evidence to the contrary. Counsel therefore argues the court must, as a matter of law, find their contention established. But such is not the law. If positive evidence is inherently improbable, the court may reach a conclusion based upon the circumstantial evidence in the case which is more convincing."

Unless other interpretations of said rules, as called to the attention of the Court of Appeals, are regarded and considered or the clearly erroneous rule stated in the Gypsum case is applied to the *entire evidence and not to a partial record*, said rules are rendered ineffectual and are destroyed. Said rules cannot be by-passed by a generalization that "a mistake has been committed" based on only a *part* of the submitted evidence. By using such generalization, the Court of Appeals was enabled to and did disregard, ignore and refuse to enforce Sections 60 a, b, and c, 67 d (6) (7), 70 a, c and e (Pars. 1, 2) of the Bankruptcy Act (11 U.S.C.A., Secs. 96, 107, 110) in that Appellant received a voidable preference when it received payment of the May and June, 1959 mortgage loans totalling $25,000.00

on the eve of bankruptcy recoverable under Section 60 a, b and c; in that said May and June, 1959 mortgage loans were fraudulent and void as to creditors and the trustee under Sections 67 d (6) (7), and 70 a, c, and e (Pars. 1, 2) of said Act, having been kept secret and unfiled which made said mortgages void as to the trustee and creditors, and void under Section 443.460, Vernon's Ann. Mo. Statutes; in that the funds received from Appellant on said mortgage loans were deposited in bankrupt's general bank account and were used in the operation of bankrupt's business (Vol. I, Tr. 23, Pars. 2, 3, Court of Appeals Opinion, Vol. III, Tr. 3, 4, Appendix A, p. A23) and became part of bankrupt's general estate. So says the United States Supreme Court in *National City Bank of New York* v. *Hotchkiss,* 231 U.S. 50, 34 S. Ct. 20, l.c. 21, 22, where the court decided this question, saying:

> "As all trace of the bank's money was lost when it entered the stream of the firm's general property, there can be no right of subrogation. Neither can the claim be upheld on the ground that there is no diminution of the bankrupt's assets, or the transaction should be regarded as instantaneous and one. The consent to become a general creditor for an hour, that was imported, even if not intended to have that effect, by the liberty allowed to the firm, broke the continuity and established the loan as part of the assets. No doubt many creditors have increased a bankrupt's estate by their advances, but they have lost the right to take them back."

See also 3 *Collier on Bankruptcy* (*14th Ed.*), Section 60.01, pp. 744-752.

That an interlaced and inter-related situation running through and common to the aforementioned four turn-over proceedings existed and made the joint hearing thereof imperative is demonstrated by the following excerpt from the

entire evidence: after C.C.C.'s Mourning and Hughes had made an inventory of all of bankrupt's free and clear used cars, Hughes and Mourning discussed with bankrupt the possibility of using bankrupt's said free and clear used cars that were not on floor plan to C.C.C. at that time, and set up said used cars on a purchase money chattel mortgage to C.C.C. to offset a portion of the $53,000.00 shortage bankrupt owed C.C.C. on new and used cars previously floor planned to C.C.C. that were sold and not paid. In the afternoon of June 30, 1959, bankrupt was agreeable to apply such used cars as collateral toward the debts. Mourning and Hughes arranged a meeting with bankrupt for that evening (June 30) to prepare and sign the chattel mortgage. Bankrupt was not there when they arrived. Mourning went ahead and prepared the mortgage that evening (June 30). [This was the same evening when bankrupt went to Appellant bank and voluntarily gave it the chattel mortgage post-dated July 1, 1959, on fifteen of said free and clear used cars.] Bankrupt came in later that evening and stated he wasn't sure that all of said used cars were free from encumbrances and wanted to wait until the next morning (July 1) before he signed any mortgage covering any cars (C.C.C. Supp. Stip. Par. 9 f, pp. 52, 53). The following morning (July 1) bankrupt stated he would not sign the mortgage as written; that he found there was a lien against some of the cars. [This was Appellant's July 1, 1959 mortgage.] Mourning and Hughes then checked the courthouse records and found that appellant had filed a chattel mortgage against a major portion of the cars described in the chattel mortgage prepared the evening before (June 30) which had been filed for record that morning in favor of Appellant. Only remaining was a few lesser value used cars on which C.C.C. was able to take a chattel mortgage (C.C.C. Stip. Par. 3 and Supp. Stip. Par. 9 f, pp. 53, 54).

There were such incidents common to all of said turnover proceeding see-sawing through said joint hearing.

II.

As to Question Presented Numbered 2(a), (b), (c) and (d).

This question relates to the November 22, 1957 $16,000.00 note and chattel mortgage. At page 6 of its opinion (Vol. III, Tr. 66, Appendix A, p. A6) the Court of Appeals says "The Referee ruled the chattel mortgage of November 22, 1957, invalid * * *". There is no such ruling (Vol. I, Tr. pp. 65-71); the Referee only subordinated Appellant's claim because of its conduct detrimental to creditors by reason of Appellant's conduct in failing to enforce the provisions of said mortgage and to timely assert its *lien*, as discussed infra.

At page 10 of its opinion (Vol. III, Tr. 70, Appendix A, p. A10) the Court of Appeals gives force to oral agreements made between the parties to the mortgage *prior to bankruptcy* and holds that such oral agreements bind the trustee *after bankruptcy*. Oral agreements made *prior* to bankruptcy do not bind the trustee upon the advent of bankruptcy. In *Fairbanks Steam Shovel Co.* v. *Wills*, 240 U.S. 642, 36 S. Ct. 466, 469, 60 L. Ed. 841, the Supreme Court discussed this question and said:

> "It is hardly necessary to say that whatever equities, if any, arose out of the mortgagor's representation that its principal place of business was Beardstown, or out of the fact that the mortgage was given to secure a part of the purchase price of the dredge, *were confined in their effect to the immediate parties, and could not operate to estop the trustee in bankruptcy representative of the interests of creditors for whose protection the recording act was passed.*" (Italics furnished).

See also *In re Urban*, 136 F.2d 296, 297, 298 (C.A. 7) and Section 443.460, *Vernon's Ann. Missouri Statutes.*

The November, 1957 note and mortgage became due on May 22, 1958 (Vol. I, Tr. 28, 29) at which time the unpaid balance was $11,000.00. By oral agreement between the parties, Appellant subsequently made payments thereon until May 7, 1959, at which time the unpaid balance was $6,000.00 (Vol. I, Tr. 29, 23). No extension was endorsed on the note nor was any written extension agreement made. When bankrupt stopped making payments on May 7, 1959, he told Appellant "I couldn't meet the obligation and we had others * * *" (Vol. I, Tr. 42). Bankrupt also talked to Appellant about long-term financing and discussed his financial condition. Bankrupt told Appellant that he (bankrupt) was doing a *lot* of expanding and needed additional cash at various times (Vol. I, Tr. 42). Appellant did not come down to bankrupt's place of business and make an audit of the assets described in the November, 1957 mortgage (Vol. I, Tr. 43). Thus from November 22, 1958 and thereafter Appellant did not know whether the described assets were there or had been replaced by the expansion.

Appellant permitted the November 22, 1957 note and mortgage to rest past due after May 22, 1958, without enforcing the terms thereof and permitted it to lie dormant without timely asserting its mortgage lien from May 22, 1958, when said debt became due, until July 8, 1959, when C.C.C. seized *all* of bankrupt's property in a replevin action (Vol. II, Tr. 40, Par. 2); from July 8 until July 13, 1959, the date of bankruptcy (Vol. I, Tr. 6) and *after* bankruptcy until September 29, 1959, when the trustee recovered the replevined property from C.C.C.; from September 29 until November 5, 1959, the date of the Order for Sale of bankrupt's property (Vol. II, Tr. 12), secured with Appellant's

cooperation and consent through its attorney (Vol. II, Tr. 8-13), under a petition which directly challenged the validity of Appellant's said mortgage (Vol. II, Tr. 11, Par. 5); from November 5 until November 9, 1959, when the trustee sold and delivered said property to the purchaser free and clear of all liens (Vol. II, Tr. 10-15) without Appellant asserting a lien right to the property at the sale and without Appellant having secured or requesting the Order of the Referee or the District Court transferring Appellant's lien rights, if any, to the fund received from said sale; from November 9, 1959 until January 19, 1960, when Appellant first asserted a lien under said November 22, 1957 mortgage by filing its claim for $6,000.00 as a secured creditor on said date but long after said property had been sold and delivered to the purchaser, and when it was impossible to ascertain whether the purported mortgaged property or any part thereof had been sold and delivered, and if so, when it was impossible to ascertain what part was sold and what amount was received therefor. Appellant failed and refused to submit this question to the courts when the courts could fairly decide the same but coyly preferred to defer submission thereof to the courts until it was too late for the courts to consider and rule it fairly as to creditors.

Appellant's President Finks testified: that the November 22, 1957 mortgage also secured all future debts between Appellant and bankrupt which included the May and June, 1959 unrecorded loans (Vol. I, Tr. 58); that the reason Appellant didn't record said mortgages was because it felt that it had ample security in its November, 1957 loans to cover said loan and these additional advances (Vol. I, Tr. 62).

It will be remembered that bankrupt explained to Appellant that Appellant was doing a *lot* of expanding and

needed additional cash from time to time (Vol. I, Tr. 42); that he was *over-expanded* (Vol. I, Tr. 54). This statement of volume in expansion gave rise to a duty on Appellant to seasonably assert its lien so as to seasonably determine whether any of the fixed assets described in said 1957 mortgage were there or whether such original fixed assets had been replaced under what bankrupt told Appellant was a *lot* of expanding and *over-expansion* as stated supra. It requires no great discussion to sustain the statement that when Appellant was rendered unable to meet his obligations to Appellant *and others*, as stated supra, it could not have resulted from a minor expansion, and it may be inferred, at least, that when Appellant spoke of a *lot of expansion and being over-expanded*, Appellant knew of what bankrupt spoke and what bankrupt meant. In the case of *In re Fredman*, 164 Fed. 131, the court there ruled:

> "If the positive evidence is inherently improbable, the court may reach a conclusion based upon the circumstantial evidence in the case which is more convincing."

Appellant's testimony that it felt it had ample security under the November, 1957 loan to cover that loan and the unrecorded May and June, 1959 additional advances (Vol. I, Tr. 62) does not comport with its conduct. When on June 30, 1959, Appellant deemed it necessary to seize bankrupt's bank account ($9,733.88) (Vol. I, Tr. 60-62) Appellant did nothing and made no effort to foreclose the 1957 mortgage; when on July 1, 1959, the next day after Appellant seized said bank account, bankrupt voluntarily executed a new July 1, 1959 chattel mortgage to claimant to protect claimant against the $6,266.12 deficiency on the June 3, 1959 mortgage loan (Vol. I, Tr. 39-41), Appellant still did nothing and made no effort to foreclose the 1957

mortgage; on July 4 or 5, when claimant seized the fifteen free and clear used cars covered by said July 1, 1959 mortgage (Vol. I, Tr. 60-62), again Appellant did nothing and made no effort to foreclose the 1957 mortgage; on July 8, 1959, when C.C.C. seized bankrupt's assets (which included all of bankrupt's fixtures, tools, equipment and machinery, *as it was on that day*) under a Writ of Replevin, Appellant did not intervene in said proceeding and claim a prior lien in the seized property by virtue of its 1957 mortgage (Vol. II, Tr. 40) but instead did nothing and made no effort to foreclose its 1957 mortgage. The foregoing is Appellant's course of conduct *prior to bankruptcy* when the 1957 mortgage was still good as between the parties.

After bankruptcy, Appellant followed the same "do-nothing" course. It filed no timely reclamation in the bankruptcy proceeding with respect to said 1957 mortgage, instead it did nothing and made no efforts respecting the same; on November 5, 1959 (approximately four months after bankruptcy) the trustee petitioned for and secured an Order to sell bankrupt's property and on November 9, 1959 reported the sale and secured the Referee's Order confirming the same (Vol. II, Tr. 10-15), and Appellant still did nothing and made no effort with respect to said 1957 mortgage; on January 19, 1960, more than two months after the sale of bankrupt's property and six months after bankrupt's adjudication, Appellant first asserted a lien under said 1957 mortgage by filing the claim mentioned supra and thus Appellant deferred filing said claim for two months after said property had been sold and delivered to the purchaser when it was impossible to ascertain what, if any, rights Appellant had under said mortgage in and to the property so sold.

Appellant's said conduct and "do nothing" policy created such inequity as to the trustee and the creditors

that by its aforesaid conduct, Appellant subordinated itself and under the law, the Referee was justified in ruling that Appellant's lien rights were subordinate to the rights of bankrupt's creditors.

In *Prudence Realization Corporation* v. *Geist*, 316 U.S. 89, 95, 62 S. Ct. 978, 982, 86 L. Ed. 1293, the Supreme Court, speaking of subordination said:

> "It is for that court (the court of bankruptcy) not without regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to which the *inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination.*" (Italics furnished).

To the same general effect is *In re Kansas City Journal-Post Co.*, 144 F.2d 791, 800 (C.A. 8).

The aforementioned facts with respect to Appellant's "do nothing" policy and its failure or refusal to timely assert a lien from May 22, 1958 until January 19, 1960, places Appellant's present claim within the *principle of law* announced in *In re Loewer's Gambrinus Brewery Co.*, 74 F. Supp. 909, 913, 914, where a claim in bankruptcy was ruled dormant and was subordinated to the claims of creditors and where that court said:

> "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside. That standard of fiduciary obligation is designed for the protection of creditors as well as stockholders. A consideration in the determination of such equities is whether or not the claim has been permitted to lie dormant for years and are sought to be enforced only when the debtor corporation is in financial difficulty. Pepper v. Litton, 308 U.S. 295, 304, 305, 306, 307 and 311, 60 S. Ct. 238, 84 L. Ed. 281.

> It is, of course, recognized that in liquidations distribution should be made by dividends of an equal percentum of allowed claims of creditors; but balanced against this is the right to subordinate where the conduct of the claimant is contrary to established equity principles." (Italics furnished).

Subordination of claims was discussed in *In re Kansas City Journal Post Co.*, 144 F.2d 781, 800 (C.A. 8), where court stated the principle of subordination thus:

> "Subordination is a means of regulating distribution results in bankruptcy by adjusting the order of creditors' payments to the level of then comparative claim positions. As indicated above, its fundamental aim is to undo or to offset an inequity in the claim position of a creditor that will produce injustice or unfairness to other creditors in terms of bankruptcy results."

The Referee properly subordinated Appellant's claim under the 1957 mortgage when Appellant trapped the trustee and bankrupt's creditors by its conduct to the point where it was impossible to accurately try and determine Appellant's rights if timely presented which Appellant failed and refused to do.

Appellant has not preserved and has no equitable rights under Section 60 a(6) of the Bankruptcy Act (11 U.S.C.A., Sec. 96 Supp.) and under the Missouri law with respect to after-acquired property (acquired when expanding). Section 60 a(6) provides against recognition of equitable liens where the requirements of the applicable law have not been complied with.

The 1957 mortgage described certain property now owned or *hereafter purchased during the life of this loan.* The *lot* of expansion and the *over-expansion* (Vol. I, Tr. 42, 54) comprehends such after-acquired property. The law of Missouri is that only an equitable lien attaches to

such after-acquired property when the same comes into existence or is acquired by the mortgagor and that the legal title as required by said Section 60 a(6) will not pass unless the mortgagee takes possession of the property before the rights of innocent third parties have attached. At bar Appellant never took possession of such after-acquired property and the rights of bankrupt's creditors have attached. In *World Investment Company* v. *Kolburt,* 317 S.W.2d 697, 700, 701 (Pars. 1-7) (Mo. App.), the court said:

> "World's claim is based upon a duly recorded chattel mortgage, executed prior to the purchase of the Cadillac by appellant Berin. The provisions of the mortgage were breached prior to the institution of this action. World, assignee, was entitled to possession under the terms of the mortgage unless it was void as a mortgage on after-acquired property. A mortgage on after-acquired property is void as to third parties unless the mortgagee takes actual possession before the rights of third parties accrue."

In *Stickel* v. *Swift & Co.,* 56 S.W.2d 806, 808, Par. 2 (Mo. App.), the rule respecting after-acquired property is stated thus:

> "The rule is that, where the mortgagee does not take possession of the after-acquired property upon its acquisition by the mortgagor and before the rights of an innocent third party have attached, the provision in question will be held void as to such innocent third party, *nor will the constructive knowledge furnished by the recording of the instrument be regarded as sufficient notice.*" (Italics furnished).

See also *Personal Finance Co. of Missouri* v. *Lewis Inv. Co., et al.,* 134 S.W.2d 655, 656, Pars. 2, 3 (Mo. App.) and *Bank of Kenneth* v. *Clayton et al.,* 241 Mo. App. 487, 245 S.W.2d 678, 683, 684, Pars. 5-9.

Appellant waived its lien and is estopped to assert same. The record shows that on November 5, 1959, Appellee filed petition to sell the replevined property (Vol. II, Tr. 10-12). In said petition (par. 5), it is alleged:

> "That so far as petitioner knows all of said property and assets to be sold under order of sale made hereunder are free from any mortgages except a note and chattel mortgage to Farmers Bank of Clinton dated November 22, 1957, recorded November 23, 1957, number 31260, in the sum of $6,000.00 which purports to be a chattel mortgage on fixtures and equipment of the Woody Motor Company when it was located on South Main Street in Clinton, Missouri."

The District Court made the requested Order of Sale (Vol. II, Tr. 12) at which Appellant's attorney also appeared as attorney for Appellee in securing said Order. Appellee accordingly sold said property, reported the sale thereof, free and clear of any encumbrances, on November 9, 1959, and said sale was approved (Vol. II, Tr. 13-15). Appellee's letter dated November 5, 1959, which accompanied the filing of the petition for an order to sell advised the Referee of a bid of $23,000.00 at private sale and that *Mr. Brock* (*Appellant's attorney*) and Appellee recommended that it would be in the best interest of the estate that the court approve the petition to sell the personal property (Vol. II, Tr. 8-10). The Order confirming private sale refers to this letter (Vol. II, Tr. 14, 15). Notwithstanding the fact that said petition for order to sell (par. 5) recited that Appellant held a "purported" chattel mortgage (Vol. II, Tr. 9), Appellant did not then assert a mortgage lien although its mortgage was challenged but instead appellant permitted said property to be sold and delivered to the purchaser and said sale to be approved without doing so at the sale or otherwise. By Appellant's failure to so do, by its conduct which constituted consent

to the sale, by Appellee's unchallenged letter dated November 5, 1959 (Vol. II, Tr. 8-10), by Appellant's participation in the proceedings to sell such property (Vol. II, Tr. 10-14), and by the Referee's reliance on said letter (Vol. II, Tr. 14, 15), Appellant waived its mortgage lien and is estopped to claim the same. The aforesaid facts and circumstances and the authorities cited infra, support the Referee's ruling to that effect.

In *Farmers Nat. Bank* v. *Missouri Livestock Commission Co.*, 53 F.2d 991, 996 (C.A. 8), the endorsee failed to assert a mortgage lien over an extended period of time and mortgagor had sold the mortgaged property, the court said:

> "The consent to sale waives lien whether purchaser knew of lien or not (Citing).
>
> That consent may be shown from implication arising from a course of conduct as well as by express words (Citing).
>
> Mr. Geis testified that cattle were sold subject to the mortgage. Of course, that is a mere conclusion of his which, as a matter of law, is erroneous. The fact of sale, as pointed out in Moffett Bros. & Andrews Commission Co. v. Kent, (Mo. Sup.), supra (5 S.W.2d 395), is inconsistent with continuation of the mortgage lien."

In *First Nat. Bank & Trust Co., etc.* v. *Stockyards Loan Co.*, 65 F.2d 226, 229, 231 (C.A. 8), the court said:

> (229) "The bank did not advise the commission houses through which sales were made that it held mortgages on cattle; nor did it have its mortgages listed with Cattle Rangers Association whose business it was to check the sales and see that the mortgages were protected as to the proceeds."

In ruling, the Eighth Circuit, at page 229, continued:

> "The facts and circumstances heretofore mentioned showing lack of care on the bank relative to

> the location of the cattle at the time of making the chattel mortgages, relative to the movements of the cattle from county to county after the mortgages were made, relative to any segregation by the bank of the cattle covered by its mortgages from a larger number in the pastures, all tend to emphasize the same lack of care on the part of the bank relative to the sale of cattle."

At page 231 the court concludes:

> "Our conclusion upon the whole record is that there was a clear waiver by the bank of its rights under the chattel mortgages held by it, both as to the movements of the cattle and the sales thereof by Moore."

The Missouri courts follow this rule.

In *Stockyards Nat. Bank* v. *B. Harris Wool Co.*, 289 S.W. 622, 632, 633, 634, 316 Mo. 427, the Supreme Court of Missouri was of the opinion:

> (632) "that the evidence conclusively shows that plaintiff impliedly consented to or acquiesced in, the sale or consignment of the wool by Wrathall, and thereby waived the lien or security of the mortgages, insofar as the wool in controversy is concerned. Hence we are of the opinion that plaintiff is estopped by its conduct * * *."

At page 633 of the *Stockyards* case cited supra, the Missouri Supreme Court quotes from *Peterson* v. *Elevator Co.*, 9 N.D. 55, 81 N.W. 59, with approval, as follows:

> "* * * It (the testimony) shows that the mortgagee saw fit to authorize the mortgagor to sell the property covered by the mortgage at private sale; and this authority was given under such circumstances as would, if acted upon, result, not only in a removal of the property from the premises of the mortgagor, but likewise in mixing the same with other grain, in one common mass, thereby rendering it impossible for the

> mortgagee thereafter to identify the property and take possession of it for the purposes of foreclosure. These facts, in our judgment, must operate as an implied waiver of the lien of the mortgage (Citing)."

In *Rogers* v. *Davis*, 184 S.W. 151, 155, 194 Mo. App. 378, the court ruled:

> "A mortgagee may fully waive his rights under the chattel mortgage though the same remains unreleased of record (Citing)."

As to the effect of the oral agreement extending time, which Appellant is said to have accorded bankrupt, note the case of *Connersville Buggy Co.* v. *Lowry*, 104 Mo. App. 186, 77 S.W. 771, where the court says:

> "It is held in Bowens v. Benson, 57 Mo. 26, that an agreement for the extension of the time for the payment of the debt did not postpone the mortgagee's right to possession of the mortgaged property for * * * failure to pay the debt at the time originally agreed on. See also Baldridge v. Dawson, 39 Mo. App. 527."

III.

As to Questions Presented Numbered 3(a), (b), (c) and (d).

The Court of Appeals' concept of appellant differs from that of Referee. With respect to the May 12, 1959 mortgage loan, the Court of Appeals says: that bankrupt "represented to the bank that he needed the money for operating capital until a major loan could be obtained from C.C.C." (Opinion p. 3, Vol. III, Tr. 63, Appendix A, p. A3); that appellant "went to lengths to aid and assist the bankrupt in his operations and should not be penalized for trying to help the bankrupt keep intact his business" (Opinion p. 14, Vol. III, Tr. 74, Appendix A, p. A14); that the May and June (1959) chattel mortgages were void *as to creditors* because they were not filed of record and the July (1),

1959 chattel mortgage was a voidable preference as it was given for an antecedent debt (Opinion p. 16, Vol. III, Tr. 76, Appendix A, p. A16); that the amount (set off of $9,733.88) "was in a general checking account used in the ordinary course of business by the bankrupt" (Opinion p. 16, Vol. III, Tr. 16, Appendix A, p. A16); that the May and June loans enriched the debtor's estate and that creditors are treated unequally to the extent the preferential payments of the May and June 1959 loans "exceeded the new advances" (Opinion pp. 25, 26, Vol. III, Tr. 85, 86, Appendix A, pp. A25, A26).

These observations refer largely to relations between the parties and disregard the rights of creditors on the advent of bankruptcy which are controlled by Sections 60 a, b and c, 67 (6) and (7) and 70 a and c, pars. 1 and 2, of the Bankruptcy Act (cited supra) and disregard the applicable ruling in *National City Bank, etc.* v. *Hotchkiss*, 231 U.S. 50, 34 S. Ct. 20, l.c. 21, 22, where the United States Supreme Court observed:

> "But, if the intent is doubtful or inconsistent with the legal effect of dominant facts, it must fail,"

and in ruling facts most similar to those at bar that court held:

> "As all trace of the bank's money was lost when it entered the stream of the firm's general property, there can be no right of subrogation. Neither can the claim be upheld on the ground that there is no diminution of the bankrupt's assets, or the transaction should be regarded as instantaneous and one. The consent to become a general creditor for an hour, that was imported, even if not intended to have that effect, by the liberty allowed to the firm, broke the continuity and established the loan as part of the assets. No doubt many creditors have increased a bankrupt's estate by their advances, but they have lost the right to take them back." (Italics furnished).

Section 60 a, b and c of the Bankruptcy Act (cited supra) deals with Preferences; Section 67 d (6) and (7) thereof deals with Liens and Fraudulent Transfers; 70 a, c and e, pars. 1 and 2 thereof provides that any transfer which "under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor".

Under 60 a (1) the preference must be a transfer to a creditor for an antecedent debt, made by debtor while insolvent or within four months before the filing of a petition in bankruptcy, the effect of which "will be to enable such creditor to obtain a greater percentage of his debt than some other of the same class". Section 60 b provides that such preference may be avoided by the trustee, if the creditor receiving it, at the time when the transfer is made, has reasonable cause to believe that debtor is insolvent.

Sections 67 and 70, of the Bankruptcy Act (cited supra) *do not* require a creditor have "reasonable cause to believe that debtor is insolvent". Only Section 60 requires this (*3 Collier on Bankruptcy* (14th Ed.), Section 60.01).

"A transfer may be both preferential (under Section 60) and fraudulent in nature (under Sections 67 d and 70 e)" (3 *Collier on Bankruptcy* (14th Ed., Section 60.03, p. 763); and "the fact that a transaction is not preferential under the Act does not mean that the transaction may not be considered fraudulent" (*3 Collier on Bankruptcy* (14th Ed.), Section 60.03, pp. 765, 766).

In its opinion page 17 (Vol. III, Tr. 77, Appendix A, p. A17), the Court of Appeals says: "The Trustee has

the burden of proving a voidable preference by a preponderance of the evidence". The modus operandi for carrying the aforesaid burden of proof is discussed and set out in *3 Collier on Bankruptcy* (14th Ed.), Section 23.10, pp. 561 (2), 562, where the author says "It should be borne in mind at the outset that the burden of proof in a turn-over proceeding is at all times on the receiver or trustee; he must at least establish a *prima facie* case. After that, the burden of explaining or going forward shifts to the other party, but the ultimate burden or risk of persuasion is upon the receiver or trustee".

In *Sheinman* v. *Chalmers*, 33 F.2d 902, 904 (2) (C.A. 3), the court considered the burden of proof modus operandi and in ruling stated:

> "Thereupon, the bankrupt, on this appeal entered into the familiar mist which arises from and surrounds the expression 'the burden of proof never shifts'. We shall not try to dispel it beyond saying that it is true the burden of proof never shifts from the party having the affirmative of an issue. *There it rests, at least, until he has made out a prima facie case. Then the burden, not of proving the proponent's case but of explaining or rebutting it, shifts to the other party. This burden he may assume or ignore as he may wish, but he will suffer the consequences of not taking it up and carrying it.* (Citing.)
>
> What the Referee plainly meant by the words 'the burden shifts' was that the trustee has proved his case against the bankrupt and it would stand, unless the bankrupt should assume the burden of explaining or contradicting it. Failing in that, the trustee's proof would stand uncontradicted."

Another element of a preference under Section 60 a of said Act is the requirement that said preference must enable the creditor to obtain "a greater percentage of his

debt *than some other of the same class.*" At page 23 of its opinion the Court of Appeals says: "The purpose of the law of preferences is to secure an equal distribution of the bankrupt's assets *among his creditors of like class.* If a transaction does not interfere with this purpose it does not constitute a voidable preference", and again referring to the payment of the May, 1959 loans (at p. 26 of the Opinion) it continues, thus: "As these transactions do not interfere with an equal distribution of the bankrupt's assets among creditors of appellant's class, we believe the repayment of the $12,000.00 May loan did not result in a preference to the bank as it precipitated new assets flowing to the bankrupt in excess of the amount of payments." (Vol. III, Tr. 83, 85, 86, Appendix A, pp. A23, A26).

The opinion raised the question of "equal distribution" to creditors of the *same class.* When bankruptcy resulted, Appellant had received $25,000.00 taken from his general estate in payment of two unfiled mortgages absolutely fraudulent and void under Sections 67 and 70 of the Act without regard as to whether it had reasonable cause to believe bankrupt was insolvent (discussed infra) which were antecedent debts. The determination of "equal distribution" and of "same class" is not when appellant was paid the $25,000.00 but by the effect of such payment when bankruptcy results. At that time creditors were deprived of and could not participate in the $25,000.00 which paid appellant's said mortgage in full.

The Supreme Court of the United States settled the question as to whether the advantage (preference) over other creditors of the same class was as of the date of the transaction or on such as might eventuate in the subsequent bankruptcy, in *Palmer Clay Products Co.* v. *Brown,* 297 U.S., 227, 80 L.Ed. 655, 56 S.Ct. 450, 451, where it is ruled:

"Whether a creditor has received a preference is to be determined not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results.

We may not assume that Congress intended to disregard the actual result, and to introduce the impractical rule of requiring the determination, as of the date of each payment, of the hypothetical question: What would have been the financial result if the assets had then been liquidated and the proceeds distributed among their creditors?"

The question as to who are creditors of the same class has been ruled by the leading case of *Swartz* v. *Fourth Nat. Bank,* 117 F. 1, 6, 7 (C.A. 8 (Sanborn J.)) thus:

"While it is true that the bankrupt act does not define the word 'class', nor in terms state what creditors are in the same class, it creates classes and specifies others, and it would seem to us that the meaning of the word 'class' in the act should, if possible, be derived from the statute itself. Section 64, 11 U.S.C.A. Sec. 104, after directing the payment of certain expenses of administration, creates three classes of creditors—parties to whom taxes are owing, employees holding claims for certain wages, and those who by laws of the states or of the United States are entitled to priority. Sections 56 (b), 57 (e), and 57 (h), 11 U.S.C.A. Secs. 92, 93, provide for the treatment and disposition of claims secured by property, and of claims which have priority. The creditors who hold these various claims, and the general creditors of the estate, constitute the classes of creditors of which the bankrupt act treats. Now, if any one of these various classes is taken by itself and examined, it will be seen that each of the creditors in the same class always receives the same per-

centage upon his claim, out of the estate of the bankrupt, that every other creditor of his class receives. Where the estate is insufficient to pay claims of different classes in full, the classes receive out of the bankrupt estate, different percentages of their claims, but creditors of the same class receive the same percentage. The test of classification is the percentage paid upon the claims out of the estate of the bankrupts."

Following Judge Sanborn's opinion is *In re Star Spring Bed Co.*, 257 Fed. 176, 180 (D.C.N.J.) in which the court ruled:

"Judge Sanborn of the Circuit Court of Appeals of the Eighth Circuit, in a very clear and well-reasoned opinion reached a different conclusion in the case of Swartz v. Fourth Nat. Bank, 117 Fed. 1, 8 A.B.R. 673. He holds that secured and unsecured creditors are in the same class within the meaning of the act and in this he is followed by the Circuit Court of Appeals of the Sixth Circuit in the case of Livingston v. Heineman, 120 Fed. 786, 10 A.B.R. 39. The act itself does not define the word 'class' nor state in terms what creditors are in the same or different classes. It creates and specifies classes and from a study of these it may be possible to arrive at a definition of the word 'class' within the meaning of the act. Section 64 specifies three classes—parties to whom taxes are owing, employees holding claims for certain wages, and those who by the laws of the states or of the United States, are entitled to priority. There are also general creditors. The three classes above mentioned have priority over general creditors. There are broadly speaking, two classes of creditors—those who have priority and are paid in full and general creditors, including secured and unsecured. These are the classes of creditors of which the Bankruptcy Act treats.

* * *

I agree with the conclusion of Judge Sanborn that within the meaning of the Bankrupt Act, the test of

classification is the percentage paid upon the claim out of the estate of the bankrupt, and that secured and unsecured creditors are in the same class."

At page 16 of its opinion, the Court of Appeals justifies the June 30, 1959, set off of $9,733.88 against the indebtedness owed the bank. At page 4 thereof, it says that appellant applied said set-off to the June 3, 1959 loan (Vol. III, Tr. 64, 76, Appendix A, pp. A4, A16). The justification is under Section 68 (a) of the Act (11 U.S.C.A. Sec. 108) and is said to be proper "*in the absence of fraud or collusion between the bank (appellant) and the bankrupt*". The error at bar is that the Court of Appeals, disregards the fact that appellant and bankrupt practiced fraud by keeping the May and June 1959 mortgage loans unfiled and secret from creditors and thus there was fraud and collusion between appellant and the bankrupt and appellant cannot reap benefit from the fraud in which it actively participated under Section 68 of the Act and the cases cited by the Court of Appeals regardless of appellant's intent.

That fraud or collusion existing between bankrupt and appellant will destroy the right of set off under said Section 68 (a) is determined by *New York County Nat. Bank* v. *Massey*, 192 U.S. 138, 24 S. Ct. 199, 48 L. Ed. 380.

The May and June, 1959 mortgage loans instruments each carry the notation "This note was not filed. We held car titles." (Vol. I, Tr. 32, 35); appellant's president Finks testified that said mortgage was not filed because appellant felt it had ample security in its November, 1957 mortgage loan (Vol. I, Tr. 62); bankrupt testified that he knew said mortgages were not filed (Vol. I, Tr. 52), thus said mortgages were purposely not filed and purposely kept secret from the creditors by agreement of the parties thereto. The Missouri Supreme Court ruled this situation in

State to Use of Mayer v. *O'Neill, et al.*, 151 Mo. 67, 52 S.W. 240, 246, where it said:

> (246) "An agreement existed between the bank and Johns that the mortgage to the bank should not be put to record, because doing this would injure Johns' credit. Such an agreement is fraudulent in fact." (Italics furnished).

At page 246 the Supreme Court continues:

> "As is pertinently observed by Richardson, J., in Reed v. Pelletier, 28 Mo. 173: 'The term "fraud" as understood in the statute concerning fraudulent conveyances has the same meaning in the attachment law, and it is not necessary to show the act originated in any meditated design to commit a positive fraud or to injure other persons. There are many acts, not the result of intentional fraud, which the law, nevertheless, from their tendency to deceive other persons, or from their injurious consequences to the public, prohibits as being within the same reason and mischief as actual fraud.'"

The court in the *O'Neill* case, cited supra, l.c. 246, discussing the effect of mortgagee taking possession where said mortgages are fraudulent and ruled thus:

> "But, as has been expressly decided, such taking possession will not nullify or neutralize an actual fraud, such as that perpetrated between the bank and Johns in concealing by agreement the mortgage between them * * * *Existing such fraud, even to a portion of the indebtedness, it will taint the whole transaction.*" (Italics furnished).

When on June 30, 1959, appellant set off $9,733.88 against bankrupt's bank account and applied the same as a payment on bankrupt's June 3, 1959 $16,000.00 mortgage loan and on the night of the same day bankrupt voluntarily gave appellant a $6,266.12 mortgage on fifteen of his

free and clear used cars, post-dated July 1, 1959, filed July 2, 1959, for no money to help appellant protect the balance due on said June, 1959 loan (Vol. I, Tr. 39, 40) and thereafter on July 4, a holiday, or July 5, Sunday (Opinion p. 20, Vol. III, Tr. 80, Appendix A, p. A20) and at night, between five or six P. M. and midnight, bankrupt permitted appellant to enter and remove said fifteen free and clear used cars from his premises (Vol. I, Tr. 56), it is apparent such subsequent close collaboration, conduct and behavior between appellant and bankrupt characterizes and reflects a fraudent animus which goes back to and prompted the transactions beginning the making of said May and June, 1959 mortgages, continuing through said set-off and gives tone to an original fraudulent purpose with respect to such transactions.

In *State to Use of Mayer* v. *O'Neill, et al.*, cited supra, at page 247, the Missouri Supreme Court discusses the effect of such agreements subsequent in point of time, and makes the following observation applicable at bar:

> "This agreement, though subsequent in point of time to the drafting of the mortgage and the taking of possession of the goods as per notice, *gives a clear insight of the animus which prompted the action of the bank and Mrs. Mayer in the whole transaction,* which was to 'hinder and delay or defraud' the creditors of Johns. *Subsequent acts of the parties are admissible evidence, when calculated to explain the motives which actuated them in the beginning, and thus give tone to the original fraudulent purpose.* But the debt to the bank being fraudulent, as already stated, it is sufficient to defeat the action of plaintiff that Young undertook the task of bolstering up the claim of the bank in the manner as above related, to the intended or resultant prejudice of Johns' creditors."

In support of the O'Neill case is *Central Nat. Bank* v. *Doran et al.*, 109 Mo. 40, 18 S.W. 836; *Sauer* v. *Behr*, 49

Mo. App. 86; *Williams* v. *Kirk*, 68 Mo. App. 457, and *Keet & Rountree Dry Goods Company* v. *Brown et al.*, 73 Mo. App. 245.

The Court of Appeals mentions that bankrupt gave appellant a financial statement as of March 31, 1959, showing a net worth of $113,713.06 (Opinion, pp. 3, 11, 21, Vol. III, Tr. 63, 71, 81, Appendix A, pp. A3, A11, A21). Part of the evidence, common to the four turn-over proceedings, shows that bankrupt was hopelessly insolvent then and during all of his transactions with appellant. As of December 31, 1957, he was insolvent by $37,990.10; as of December 3, 1958, he was insolvent by $126,933.73; and as of May 31, 1959 (approximately six weeks prior to bankruptcy) he was insolvent by $149,072.73 (Vol. II, Tr. 39, Par. 1); another part of such common evidence shows that bankrupt's liabilities ($273,000.00) exceeded his assets ($163,000.00) by $120,000.00 (C.C.C. Supp. Stip., page 42, filed March 17, 1966).

Notwithstanding such actual insolvency, the circumstances surrounding the making of the May and June, 1959, mortgage loans, stated supra and the agreement not to file such mortgages and thus keep their existence secret from creditors and appellant's collecting payment thereof without the knowledge of bankrupt's creditors, point squarely to the answer that appellant *had* the "reasonable cause" required by Section 60 (b) of the act or at least was put upon inquiry and was bound by what it could have discovered. *C. W. Swanson et al.* v. *Wylie*, 237 F.2d 16, 19 [par. 4] (C.A. 9) This is especially true since appellant actually and actively participated in creating the instant fraud on creditors by failing to file said mortgages pursuant to its understanding with bankrupt. In addition the record is replete with evidence that appellant was informed and was being kept informed of bankrupt's pursuit for a

capital loan made necessary by a *lot* of expansion and *over* expansion, detailed in paragraphs 7, 8, 11, 12, 13, 14 of the Statement, supra. This also gave appellant said "reasonable cause".

In *Smyth* v. *Kaufman*, 114 F.2d 40, 41 (C.A. 2) the debtor told the executors of the creditor's estate that "it was hard pressed for cash" and gave them assurance that it was "working on quite a number of new deals for capital" (as in the case at bar). Thereafter bankrupt made two $500.00 payments to said executors which the trustee sued to recover as preferences (as at bar). The District Court found that said executors had "reasonable cause" to believe bankrupt was insolvent based on the aforementioned statements to them and that the effect of such payments was to enable the executors to obtain a greater percentage than other creditors of the same class and held that said payments were recoverable preference (as at bar). On appeal, the Court of Appeals concluded (l.c. 41) "there was much evidence to inform executors that bankrupt was in financial difficulties" and ruled:

> "It cannot be said that there was not evidence to support the finding of the trial court that the executors had reasonable cause to believe that Kapik (bankrupt) was insolvent."

This should have been the Court of Appeals' ruling at bar.

Lastly, in its opinion at page 23 (Vol. III, Tr. 83, Appendix A, p. A23), the Court of Appeals refers to and grants appellant the right of set off under Section 60 c of the Act and states that said "statute itself allows an offset against the recovery of a preference". It then proceeds with an erroneous mathematical calculation showing that bankrupt's estate was actually enriched by the fraudulent

manipulations incident to the May and June 1959 unfiled chattel mortgages which were paid to appellant. The Court of Appeals disregards the fact that said section is not applicable at bar for the following reason:

1. The May and June 1959 loans were secured by mortgages which the Court of Appeals ruled were void. (Opinion p. 16, Vol. III, Tr. 76, Appendix A, p. A16). Section 60(c) provides that "If a creditor has been preferred, and afterwards *in good faith* gives a debtor credits *without security of any kind*" *then* the amount of such new credit remaining unpaid at the time of bankruptcy may be set off against the amount which would otherwise be recoverable from him".

The Court of Appeals misapplied Section 60 c in that (a) the credit extended by appellant was under a fraudulent transaction declared so by the Referee, affirmed by the District Court and found so by the Court of Appeals, and thus the credit extended by appellant cannot be in "good faith" as required by said section: the "good faith" mentioned in Section 60(c) cannot spring from transfers void and fraudulent as to creditors; (b) the credit extended by appellant was not without security of *any kind* but was *with* security, namely, the May and June 1959 chattel mortgages.

2. The Court of Appeals erred in its mathematics showing that bankrupt's estate was enriched when under *National City Bank of New York* v. *Hotchkiss*, cited and quoted supra; the United States Supreme Court held (as the Court of Appeals here also found) that the said loans having passed into bankrupt's general checking bank account, said funds became part of bankrupt's general estate and payment therefrom of said fraudulent and void May and June unfiled mortgages depleted instead of enriching

bankrupt's general estate to the detriment of creditors of the same class.

Section 60c not being applicable the Court of Appeals erred in allowing said fraudulent and void May and June 1959 chattel mortgage loans to be used as offsets against the recoverable $12,000.00 and $13,000.00 preferential payments which appellant received.

The Court of Appeals also erred in ruling that said payments to appellant totalling $25,000.00 made on the eve of bankruptcy were not voidable, preferences recoverable by the trustee but, arguendo, if they were, it erred nevertheless in disregarding the trustee's right to recover said payments under Sections 67 and 70 of the Bankruptcy Act as fraudulent and void transfers under said sections and also under Section 443.460 of *Vernon's Annotated Missouri Statutes.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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October, 1967

APPENDIX A

I

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 18,588

THE FARMERS BANK OF CLINTON, MISSOURI,

Appellant,

vs.

VANCE JULIAN, TRUSTEE IN BANKRUPTCY OF ROBY C. WOODY, d/b/a WOODY MOTOR COMPANY, BANKRUPT,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

August 8, 1967

Before VOGEL, Chief Judge, GIBSON and HEANEY, Circuit Judges.

GIBSON, Circuit Judge.

This appeal concerns the Referee in Bankruptcy's orders disallowing alleged secured claims, ordering a turnover of certain alleged preferences, disallowing a bank account setoff as a preference, and subordinating appellant's secured claim to those of the general creditors of the bankrupt estate.

This appeal covers only a part of the bankruptcy administration in the Roby C. Woody bankruptcy, there being other appeals pending relative to other phases of the administration of the bankrupt estate. The District Court on Petition for Review sustained all of the Referee's findings and orders against appellant.

Roby C. Woody, d/b/a Woody Motor Company, commenced business on April 15, 1945, in Clinton, Missouri, as a franchised Cadillac and Oldsmobile dealer. He conducted the usual retail auto sales and service business of a franchised dealer, selling new and used cars, carrying a parts inventory, and maintaining service equipment necessary to operate an automobile agency. The bankrupt, Woody, utilized the financial services of the appellant, along with other banks and the large automobile financing credit institutions of GMAC, Commercial Credit Corporation and possibly C. I. T.

NOVEMBER 1957 LOAN

On November 22, 1957 Woody borrowed $16,000.00 from The Farmers Bank of Clinton, Missouri (hereafter referred to as "appellant" or "Bank"), secured by a note and chattel mortgage on "All machinery and shop equipment, Oldsmobile special tools, Cadillac special tools, furniture, fixtures, and parts bins, parts, accessories, oil and grease, and paint now owned, or hereafter purchased during the life of this loan, by Woody Motor Company,

R. C. Woody sole owner." This chattel mortgage was duly filed of record the following day. The note secured by the chattel mortgage called for payments of $1,000.00 per month plus interest, for five months with a final payment of $11,000.00 due on May 22, 1958.

The monthly payments were made as agreed but the final payment of $11,000.00 was not made as called for in the note on the due date, though the $1,000.00 monthly payments were continued until August 27, 1958, at which time there remained a balance of $7,000.00 due on the note. An oral extension of the note was made, according to the parties, with interest being paid monthly and subsequently two $500.00 payments were made, bringing the balance on the note down to $6,000.00 as of June 4, 1959.

MAY 12, 1959 LOAN

In the spring of 1959 Woody furnished the Bank with his financial statement dated March 31, 1959, which also included a Profit and Loss Statement of his operations for the first tnree months of 1959. This statement showed a net worth of $113,713.06 and a profit of $17,305.67 for the three-month period. On May 12, 1959 the Bank lent Woody an additional $12,000.00 evidenced by a note due in seven days and secured by a chattel mortgage on some automobiles. The chattel mortgage was not filed of record. Woody represented to the Bank that he needed the money for operating capital until a major loan could be obtained from Commercial Credit Corporation. The sum of $9,000.00 was repaid on this loan by June 3, 1959, leaving $3,000.00 balance due.

JUNE 3, 1959 LOAN

On June 3, 1959, Woody borrowed an additional $16,-000.00 from the Bank, $3,000.00 of which was credited to

the balance owing on the May 12 loan, discharging the May 12 loan. The remaining $13,000.00 of this loan was deposited to Woody's bank account and the loan was secured by a chattel mortgage on certain automobiles but was not filed of record. This loan was payable on demand.

An agent of the Commercial Credit Corporation was scheduled to be in Woody's place of business on about June 23, 1959 to finalize Woody's application for a major operating loan but was delayed one week in arriving. The Bank agreed to go along with Woody during this interim period. The agent of the Commercial Credit Corporation did appear on June 30, 1959 and when an officer of the Bank conferred with him and Woody at Woody's place of business, the officer found out that Commerical Credit would not make the loan until it had a detailed audit of Woody's operation. Woody and the Commercial Credit agent then requested the Bank to make a long-term loan to Woody.

At this point the officer of the Bank decided that Commercial Credit would not make the long-term operating loan. He then returned to the Bank and applied a setoff of $9,733.88 in Woody's bank account to the $16,000.00 indebtedness of June 3, 1959. On the following day, July 1, 1959, Woody gave the Bank a note and chattel mortgage on several motor cars for the remainder of the $16,000.00 indebtedness, namely $6,266.12. This chattel mortgage was filed on July 2, 1959. The cars covered under the mortgage were repossessed on either July 4 or 5, 1959, and subsequently sold for $4,850.00. A return premium on an insurance policy provided the Bank $550.00, and Jerry Woody, a third person, paid the Bank the remaining balance of $866.12—due on this indebtedness.

In addition to Woody's indebtedness to the Bank, the Commercial Credit Corporation was given a note and

chattel mortgage on July 1, 1959, recorded July 2, 1959, that covered the same property as is described in the Bank's November 22, 1957 chattel mortgage, and was made "subject to the first chattel mortgage of record" to the Bank. On July 8, 1959 the Commercial Credit filed a replevin action against the items covered by its chattel mortgage. The next day, July 9, 1959 Woody made an assignment for the benefit of creditors.

An involuntary petition in bankruptcy was filed July 13, 1959. Woody filed an answer on the same date admitting that he was insolvent, and an adjudication of bankruptcy and order of general reference was made July 14, 1959. Vance Julian was duly appointed as the Receiver and later as Trustee for the property and assets of the bankrupt.

The Trustee recovered the furniture and fixtures, the shop equipment, parts and chattels used in Woody's business from Commercial Credit. The Trustee valued these assets in his Petition for Order of Sale at $30,394.43.[1] This property was ordered sold free and clear of all incumbrances on November 5, 1959 and was actually sold on November 9, 1959 at a private sale for $23,000.00.

The Bank filed its claim as a secured creditor for the $6,000.00 together with interest at 7 percent from June 4, 1959 on the balance due on its note and chattel mortgage

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1. "(a) Automobile parts, accessories, and supplies appraised at $19,149.05
"(b) Oil, grease, and anti-freeze appraised at 1,773.53
"(c) Office equipment appraised at 1,157.70
"(d) Shop equipment appraised at 6,292.15
"(e) Steel bins for automobile parts appraised at 2,022.00
Total ..... $30,394.43"

of November 22, 1957. The Trustee objected to the allowance of the claim and asserted in addition that the Bank had received within four months of the filing of bankruptcy void or voidable preferences and void and voidable transfers on account of antecedent and other debts while Woody was insolvent and at a time when the Bank had reasonable cause to believe that Woody was insolvent.

The Referee ruled the chattel mortgage of November 22, 1957 invalid, that the repayment of the $12,000 note of May 12, 1959 was a preference, that the repayment on the $16,000.00 note of June 3, 1959 was "a preference and/or fraudulent" (to the extent of $13,000.00) and that the Bank was not entitled to a setoff of $9,733.88 in Woody's bank account as he found the account had been "built up . . . under prearrangement". The Referee directed the Bank to turn over $25,000.00 to the Trustee and then conditioned on compliance with the turnover order allowed the Bank's claim as a subordinate and inferior claim to the rights of general creditors.[2]

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2. In summary, there are three basic loan transactions in this dispute:

I. $16,000.00 on November 22, 1957 secured by a recorded chattel mortgage. At the time of bankruptcy, $6,000.00 remained unpaid on this loan. The Bank filed a claim asserting a secured position. The Referee found the security to be invalid and further held that the Bank's claim should be subordinated to that of the general creditors.

II. $12,000.00 on note and unrecorded chattel mortgage of May 12, 1959, which was paid down to $3,000.00 by June 3, 1959. The Referee held that the repayment of this loan constituted a preference.

III. $16,000.00 on note and unrecorded chattel mortgage of June 3, 1959.

(a) $3,000.00 was applied to the May 12 loan thus discharging that indebtedness.

(b) The $16,000.00 debt was satisfied by the Bank in the following manner:

STANDARD OF REVIEW

The Bank contends the Referee's findings and orders issued pursuant thereto and the District Court's approval of them on review were, in the respects complained of, clearly erroneous.

General Order in Bankruptcy No. 37 makes the Federal Rules of Civil Procedure applicable to bankruptcy proceedings "insofar as they are not inconsistent with the Act" and commands that these Rules "be followed as nearly as may be."[3]

Rule 52(a) Fed. R. Civ. P., states that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Likewise, under General Order in Bankruptcy No. 47, unless other-

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(1) $9,733.88 was set off by the Bank on June 30, from a checking account maintained by Woody. The Referee held that this setoff was collusive and void.

(2) Chattel mortgage of July 1, 1959 under which Woody's cars were seized and sold for $4,850.00. The Referee held this security void as it was for an antecedent debt.

(3) Payment from third party sources: $550.00 from an insurance premium and $866.12 by Woody's son.

The Referee issued a turnover order covering the $12,000.00 repayment on the May 12, 1959 loan and the repayment of the $13,000.00 secured from the Bank on the June 3, 1959 loan of $16,000.00. Total turnover order of $25,000.00.

3. This Court in an opinion by Judge Blackmun in *O'Rieley* v. *Endicott-Johnson Corporation*, 297 F.2d 1 (1961), pointed out that under General Order in Bankruptcy No. 37, 11 U.S.C.A. following § 53 provides that the Federal Rules shall be followed in bankruptcy proceedings "as nearly as may be." and states at p. 4: "It has been held specifically that Rule 52(a) applies to bankruptcy proceedings. *United States Machinery Movers* v. *Beller*, 8 Cir. 1960, 280 F.2d 91, 94, cert. den. 364 U.S. 903, 81 S. Ct. 236, 5 L.Ed.2d 195; In re *Rockford Baseball Club*, 7 Cir., 1953, 201 F.2d 685, 686."

wise directed in the order of reference the Referee "shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous."

In applying and interpreting the "clearly erroneous" standard, the courts have used varying language to indicate the thrust and limitations of this principle. The Supreme Court in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) said: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." This language is later quoted with approval in *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960).

In *Magidson* v. *Duggan*, 212 F.2d 748, 752-753 (8 Cir. 1954) cert. denied 348 U.S. 883, Judge Sanborn paraphrased the Rule as follows:

> "The findings of fact of a trial court are clearly erroneous within Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A., when (1) not supported by substantial evidence, (2) contrary to the clear preponderance of the evidence, or (3) based upon an erroneous view of the law. *Aetna Life Insurance Co.* v. *Kepler*, 8 Cir., 116 F.2d 1, 5; *Kasper* v. *Baron*, 8 Cir., 207 F.2d 744, 748."

In *O'Rieley* v. *Endicott-Johnson Corporation*, 297 F.2d 1, 6 (8 Cir. 1961), Judge Blackmun views the "clearly erroneous" standard as:

> "* * * that is, whether, although there is supporting evidence, 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed', *United States* v. *United States Gypsum Co.*, 1948, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746; *Commissioner of Internal Revenue* v. *Duberstein*, 1960, 363 U.S. 278, 291,

80 S. Ct. 1190, 4 L. Ed. 2d 1218, or whether 'they are based upon a substantial error in the proceedings or upon a misapplication of the controlling law, or if they are unsupported by any substantial evidence, or if they are contrary to the clear weight of all the evidence'. *Kauk* v. *Anderson*, 8 Cir., 1943, 137 F.2d 331, 333. See *Pendergrass* v. *New York Life Ins. Co.*, 8 Cir., 1950, 181 F.2d 136, 138."

We now proceed to review the Referee's findings applying the "clearly erroneous" standard.

WAS THE BANK A SECURED CREDITOR UNDER THE NOTE AND MORTGAGE OF NOVEMBER 22, 1957?

The Referee found "for a period approximating two years prior to bankruptcy, * * * [the Bank] made no effort to act promptly (under the powers granted to it in said default clause) to foreclose its lien or exhaust its rights" and was passive as to its claim thereunder and "permitted the same to lie dormant for said two-year period and did nothing as to bankrupt's breaches and defaults of said prior mortgage * * *", and that the claim became inferior and subordinate to the rights of general creditors.

The undisputed facts show that this note and chattel mortgage were given for a valid consideration; that $16,000.00 was advanced and paid to Woody; that monthly payments of $1,000.00 plus interest were paid each and every month to and including August 1958, leaving a then balance of $7,000.00; that although the $11,000.00 balloon balance due in May 1958 was not paid on the due date, the note was orally extended and the $1,000.00 monthly payments were continued to and including August 1958 and the interest was paid monthly thereafter until June 4, 1959.

Under § 443.460 R. S. Mo. 1959, the chattel mortgage was a valid security instrument, the due filing thereof served as constructive notice of its provisions and it remained valid under § 443.500, R. S. Mo. 1959 for a period of five years. We are concerned only with that part of the mortgage covering the fixtures and shop equipment and not that of the movable stock of goods, such as the parts, accessories and goods held for sale to the public as an inventory stock in trade. Woody testified that the furniture and fixtures, tools and shop equipment covered under the November 1957 chattel mortgage were the same fixtures and equipment that was on hand at the time of the bankruptcy.

The Trustee has indicated that some additions or improvements might have been made on the fixtures and equipment, but there is no probative evidence to this effect. Woody testified that it was the same equipment. The Bank did testify through its officers that Woody was expanding his operation and that Woody always kept on hand up-to-date tools and equipment, but this alone is not evidence of replacement of fixed assets covered under the chattel mortgage. In addition to the enumerated items, the chattel mortgage covered "and the increase thereof."

This chattel mortgage was only nineteen months old at the time of the bankruptcy, had been paid down from $16,000.00 to $6,000.00 and was certainly not, as found by the Referee, to have been in default approximately two years. An agreement to extend the time to pay off a note secured by a mortgage does not have to be in writing. *Fisher* v. *Stevens*, 44 S.W. 769 (Mo. 1898); *Baade* v. *Cramer*, 213 S.W. 121 (Mo. 1919). An extension of a note, under Missouri law, does not destroy or in any way impair the security, which continues so long as the debt remains unpaid. *Christian* v. *Newberry*, 61 Mo. 446, 451 (1875).

Lippold v. *Held*, 58 Mo. 213, 216-217 (1874) states "the general rule is, that no mere change in mode and time of payment, nothing short of actual payment of the debt or an express release, will operate as a discharge of the mortgage. The lien lasts as long as the debt, * * *." Though *Lippold* deals with a real estate mortgage, the same principle is applicable to personal property. There is no requirement under Missouri law that a creditor foreclose his lien immediately upon default. Nor is it unlawful or sinister for a creditor to carry along a debtor. Particularly is this true when that debtor is operating a going business, utilizing other services furnished by the creditor, is expanding operations, and furnishes a balance sheet showing a net worth of over $113,000.00 and a first-quarter profit of over $17,000.00.

Trustee also contends that the Bank waived its chattel mortgage lien of November 1957 by failing to assert it against the replevin suit of Commercial Credit and later when the property was in the Trustee's possession, who subsequently sold it under Court order free and clear of liens.

There was no concealment of this lien. It was filed of record, which is notice to all. The Bank was under no legal duty to act at the time of the replevin suit as the Trustee had the right of possession, which he did obtain. The Court ordered this property sold free and clear of liens, which is the usual procedure in these type of cases and any valid lien on the chattels is transferred to the proceeds of the sale. *Coulter* v. *Blieden*, 104 F.2d 29 (8 Cir. 1939), cert den. 308 U.S. 583; *Van Huffel* v. *Harkelrode*, 284 U.S. 225 (1931).

We believe the Referee's finding and order invalidating the secured claim of $6,000.00 plus interest under the

November 22, 1957 note and chattel mortgage clearly erroneous as without any substantial evidentiary support. The claim should be allowed as a secured claim. There were sufficient assets received on the sale of the bankrupt's property covered by this chattel mortgage, exclusive of the movable stock of goods, to pay the claim in full.

SUBORDINATION OF THE BANK SECURED CLAIM ON ITS CHATTEL MORTGAGE OF NOVEMBER 22, 1957.

The Referee, in addition to denying the Bank the status of a secured creditor on its chattel mortgage claim for the balance of the note executed November 22, 1957, subordinated it to the claim of general unsecured creditors. The Supreme Court in *Pepper* v. *Litton*, 308 U.S. 295, 296, 306-7 (1939), points out that courts of bankruptcy are essentially courts of equity and in connection with the allowance and disallowance of claims, the court has the power "* * * to disallow or to subordinate such claims in the exercise of its broad equitable powers. * * * The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arms' length bargain."

Most subordination cases deal with unconscionable claims. *Pepper* revealed a scheme to defraud creditors and the subordination power is usually exercised against corporate insiders who take advantage of their position and knowledge to defraud creditors. *In re V. Loewer's Gambrinus Brewing Co.*, 74 F.Supp. 909 (S.D.N.Y. 1947) affd. 167 F.2d 318 (2 Cir. 1948), approved subordination of claims of officers, directors and stockholders that did not carry the earmarks of an arms' length bargain. *Braddy* v. *Randolph*, 352 F.2d 80 (4 Cir. 1965), was another insider case in which the corporate president's claim

and deed of trust were subordinated to claims of creditors, because of initial under-capitalization and mismanagement of the Corporation.

This Circuit in *In re Kansas City Journal-Post Co.*, 144 F.2d 791 (8 Cir. 1944), in an opinion by Judge Johnsen exhaustedly reviewed the law on bankruptcy subordination of claims. That case, at page 800 points out that while bankruptcy proceedings are a composite of law and equity jurisdiction under § 11 of Title 11, U. S. C., the court essentially, in dealing with creditors' claims, sits as a court of equity: (under *Pepper* v. *Litton*) "*but 'not without appropriate regard for rights acquired under rules of state law', Prudence Realization Corporation* v. *Geist*, 316 U.S. 89, 95"; that "Subordination is a means of regulating distribution results in bankruptcy by adjusting the order of creditors' payments to the equitable levels of their comparative claim positions;" and

> "As indicated above, its fundamental aim is to condition or to undo or to offset any inequity in the claim position of a creditor that will produce injustice or unfairness to other creditors in terms of the bankruptcy results. Its most common uses perhaps are to nullify the effect of any fraud that a creditor has committed, to prevent unjust enrichment in a fiduciary relation, and to make the transaction of officers with the corporation conform to their sound realities in the existing situation."

That case dealt with a stockholder and bondholder claim and the Referee's action of subordination against him was disapproved by both the District Court and the Court of Appeals.

This power of subordination must be soundly exercised and it should not operate to take away any rights punitively to which a creditor is justly entitled and thus give

it to other creditors who have no fair right to it. *Kansas City Journal-Post* requires either "fraud or inequity" as the proper basis for subordination. Again this Court in *Kenneally* v. *Standard Electronics Corporation*, 364 F.2d 642 (8 Cir. 1966), held that the secured claim of a creditor, which had effective control of the bankrupt corporation, should not be subordinated since there was no evidence of actual fraud or unfairness. In other words "fraud or unfairness" (unfairness is equated with inequity) is essential for a decision to subordinate.

In the case at bar we are dealing with the duly recorded security of the Bank, which had no interests in the bankrupt's operation, except as a creditor supplying the normal banking services of accounts and loans to the bankrupt. *there is absolutely no evidence of any fraud or unfair dealing.* The Bank went to lengths to aid and assist the bankrupt in his operations and should not be penalized for trying to help the bankrupt keep intact his business. No other creditors were misled or suffered any damage by reason of the Bank extending credit under the November 22, 1957 chattel mortgage. The order of the Referee subordinating this claim is clearly erroneous as being without any evidentiary basis.

THE REFEREE'S TURNOVER ORDER OF $25,000.00.

The Bank's loan of $12,000.00 to Woody on May 12, 1959 and the subsequent loan of $16,000.00 on June 3, 1959 are the subject of the Referee's turnover order. Before the June loan was obtained, $9,000.00 was repaid by the bankrupt on the May loan, with $3,000.00 of the June loan being used to pay the balance of the May advance. The Referee characterized these loans as temporary financing until Woody could obtain a long-term capital loan

from Commercial Credit Corporation or others and held that the Bank was informed of and knew of the bankrupt's financial condition.

The Referee found that the setoff by the Bank of $9,733.88 was a preference; and the Bank acting together with another bank, The First National Bank of Clinton, and in unison and jointly with the bankrupt, had "a collusive pre-arranged and planned formula of action * * * with respect to the concurrent seizure of the bankrupt's bank accounts in such banks and with respect to bankrupt's transfer of free and clear assets to each of the Banks without consideration * * *." This latter transfer by way of the July 1, 1959 chattel mortgage also constituted a preference.

The Bank contends that its advancements of $12,000.00 and $13,000.00 net by these loans were secured by the November 22, 1957 chattel mortgage. This so-called open-end chattel mortgage of November 1957 covered future advancements. However, specific chattel mortgages on cars were taken to cover these lons, and no mention was made of coverage of these transactions under the 1957 chattel mortgage. The Bank concedes that the unrecorded chattel mortgages given to secure these loans are void as to creditors and likewise concedes that if these advances were not secured by the November 1957 chattel mortgage the finding of fact that these two loans were unsecured is correct.

We think the Referee's finding on this issue is correct. There is no substantial evidence showing that these loans were to be secured by the November 1957 chattel mortgage. No mention of that mortgage was made at the time of these advances, the taking of new chattel mortgages on cars at the time of the advances and the subsequent taking of the July 1, 1959 chattel mortgage on cars to secure this in-

debtedness negatives any intention or agreement between the parties that the 1957 chattel mortgage should cover such advances. The Referee's finding that this indebtedness was not properly secured and constitutes only a general unsecured claim is clearly correct and must stand. The May and June chattel mortgages were void as to creditors because they were not filed of record and the July, 1959 chattel mortgage was a voidable preference as it was given for an antecedent debt.

Taking the loans out of order, we now consider the June 3 loan of $16,000.00 in which the Bank stands as an unsecured creditor.

WAS THE BANK ENTITLED TO OFFSET THE BANKRUPT'S ACCOUNT AGAINST THE $16,000.00 LOAN?

The Bank set off $9,733.88 on June 30, 1959 against the $16,000.00 indebtedness owed the Bank. This amount was in a general checking account used in the ordinary course of business by the bankrupt. Section 68(a)[4] of the Bankruptcy Act, 11 U. S. C. 108 applies and allows a setoff to the Bank unless the account has been accepted or built up for the real purpose of permitting the Bank to obtain a preference by way of setoff of the account. A bank account at the time of filing the petition in bankruptcy is a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the bank and the bankrupt, the bank may set the account off against any indebtedness owed it by the bankrupt. *New York County National Bank* v. *Massey,* 192 U.S. 138 (1904); *Mingus* v. *Bank of Ethel,*

4. "§ 108. Set-offs and counterclaims.

"a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

117 S.W. 683 (Mo. App. 1909); *Lebrecht* v. *New State Bank of Woodward*, 229 S.W. 285 (Mo. App. 1921); 4 Collier on Bankruptcy, § 68.16. Section 68(a) of the Bankruptcy Act did not create the right of setoff but it "recognizes this right and it cannot be taken away by construction because of the possibility that it may be abused." as it "would precipitate bankruptcy and so interfere with the course of business as to produce evils of various and farreaching consequence". *Studley* v. *Boylston National Bank*, 229 U.S. 523, 529 (1913).

The bank has the right to set off deposits against indebtedness even though the bankrupt is insolvent at the time of setoff and before the petition in bankruptcy is filed. *Fourth Nat. Bank of Wichita* v. *Smith*, 240 F. 19 (8 Cir. 1916); *In re Merchandise Mart of Columbia*, 79 F. Supp. 686 (E.D.S.C. 1948).

The Trustee has the burden of proof of proving a voidable preference by a preponderance of the evidence. *City Nat. Bank* v. *Slocum*, 272 F. 11 (6 Cir. 1921) cert. denied 257 U.S. 637; *Moran Bros., Inc.* v. *Yinger*, 323 F.2d 699 (10 Cir. 1963).

The issue is: Was the account of the bankrupt built up, with the understanding of the Bank, for the purpose of allowing the Bank to use it as an offset and thereby obtain a preference?

The Referee in his turnover order, paragraph 4, evidently considered this setoff as a preference, though he did not definitely state it to be such. However, the net effect of his turnover order of $25,000.00 would necessarily treat the setoff as a preference. The Referee's reasons were that on June 27, 1959, the bankrupt's bank balance was $34.84; on June 29, 1959 it was $10,581.15 plus an additional deposit on that same day of $762.15; and on June

30, 1959 a deposit of $480.00 was made. These deposits built up the account to $11,197.14, which build-up the Referee found to be under "pre-arrangement."

The Bank paid checks on the day of setoff totaling $1,463.26, leaving a balance of $9,733.88, which the Bank set off against Woody's indebtedness on June 30, 1959.

In addition to the evidence cited by the Referee the record shows that this account during the month of June 1959, as in prior months, was an active one. Deposits and withdrawals occurred every business day, the volume of deposits during the month totaled over $175,000.00. On five days during that month, prior to the June 29 deposit of over $10,000.00, deposits in excess of $10,000.00 were made. This account fluctuated widely and on eight days the closing balance exceeded $9,000.00 prior to June 29. The account was twice overdrawn and the account had a balance of over $12,000.00 on June 18, 1959. The average amount of deposits and withdrawals amounted to over $6,000.00. The money was usually withdrawn a short time after it was deposited as Woody was utilizing this money as fast as it became available.

After the Bank made the setoff on June 30, a number of Woody's checks that had previously been written on this account were returned because the account had been closed by the setoff. Woody testified that immediately prior to June 30, 1959 he made no effort to build up the bank account or make deposits other than to cover checks which he had written; and that the deposits were made in the usual course of business.

The Bank did not avail itself of the right of setoff until after an official of the Bank on the morning of June 30 had gone to Woody's place of business to discuss with Woody and an agent of Commerical Credit Corporation

the making of a long-term capital loan, which the Bank had been led to believe was in the offing and for which purpose an agent of Commercial Credit had made the trip to Woody's place of business. It was not until the officer of the Bank found out that Commercial Credit Corporation would not make the long-term loan that the Bank proceeded to set off the account. It was at that point that the officer of the Bank returned to the Bank and made an immediate setoff.

The Bank on that same day had already honored a number of checks totaling some $1,400.00. This evidence clearly indicates that there was no collusive build-up of the bank account and that the Bank only decided to make the setoff on the day the setoff was actually executed. The refusal of Commercial Credit to proceed with the long-term capital loan triggered the Bank's decision to avail itself of its setoff right. The pattern of deposits and withdrawals throughout the month is fairly uniform and is certainly in line with the normal business operation of the bankrupt.

The fact that checks were outstanding against the account at the time of setoff negatives any intent on Woody's part to build up the account for the purpose of setoff, and there is absolutely no evidence of any collusive or prearranged plan of action between Woody and the Bank to build up this account.

The Referee's recital of the closing balances on June 27, 1959 and June 29, 1959 might be considered as a scintilla of evidence but the clear weight of the evidence is against the finding of the Referee of a voidable preference on the setoff, and the finding giving effect to a voiding of the setoff is clearly erroneous. We have the definite and firm conviction that a mistake has been committed in not allowing the setoff to stand. Upon reinstating the setoff, it

should be applied against the unsecured indebtedness of $16,000.00 owing to the Bank.

This leaves a balance of $6,266.12 properly remaining unpaid of this unsecured $16,000.00 indebtedness. As stated earlier, the Bank attempted to satisfy this remaining indebtedness by taking a chattel mortgage on some of the bankrupt's assets on July 1, 1959 and foreclosing on the mortgage a few days later. The sum of $4,850.00 was secured on the sale of these assets. The July 1, note and mortgage were given on an antecedent debt and thus void as to the Trustee. This sum was properly ordered turned over to the Trustee.

Subsequent to bankruptcy the amount of $550.00 was received from a return of insurance premiums, and $866.12 was paid to the Bank by Jerry Woody, a son of the bankrupt, but a third party to the bankrupt's operation. These payments from third parties do not constitute a voidable transfer under § 60(a)(1) of the Bankruptcy Act as there is nothing in the record to show that these payments were made from or came out of "the property of a debtor". The Trustee in argument concedes these third party payments do not constitute a voidable preference. Thus, they were improperly made a part of the turnover order by the Referee.

In summary, of the $16,000.00 June indebtedness, $9,733.88 was properly set off by the Bank as a mutual indebtedness. The sum of $1,416.12 came from third parties subsequent to bankruptcy. Only the $4,850.00 coming from the sale of assets foreclosed under the voidable July 1 chattel mortgage may be recovered by the Trustee. For that amount the Bank must stand as an unsecured creditor.

WAS THE REPAYMENT OF THE MAY $12,000.00 LOAN A PREFERENCE?

The May loan was paid by Woody within four months of bankruptcy. On June 3, however, the sum of $3,000.00 remained unpaid. This substantial repayment of the May loan precipitated the June loan of $16,000.00. Woody received $13,000.00 in cash and $3,000.00 went to satisfy the balance of the May loan. These loans actually went to increase the bankrupt's assets and were made in the ordinary course of business to finance Woody as an operating entity.

The Referee held that the payment of the May loan was made while the Bank had "knowledge of bankrupt's insolvency or with reasonable grounds to believe that bankrupt was insolvent." The facts simply do not support this conclusion of the Referee. There is no direct evidence to show that the Bank knew or had reason to know that Woody was insolvent at the time payment was made on this loan. Woody had furnished the Bank with a financial statement dated March 31, 1959 showing a net worth of over $113,000.00 and a quarterly profit of over $17,000.00.

The fact that the Bank granted Woody a $16,000.00 loan on June 3, only a few days following the alleged preferential payments, indicates that the Bank did not believe Woody was insolvent. Obviously, had the Bank believed Woody to be insolvent they would have been extremely reluctant to extend this new credit. Even more obviously, had the Bank suspected that Woody was insolvent they would have been very careful to demand and perfect security on the additional loan. The fact that the Bank failed to perfect the security on either the May or the June loan indicates that it had confidence in Woody's financial condition and did not believe him to be insolvent when the payments were made on the May loan.

It is true the Bank knew Woody was desirous of obtaining some long-term capital financing. However, this is not unusual for any business, especially comparatively small businesses in the throes of expansion. The test for "insolvency" under § 1(19) of the Bankruptcy Act is not the inability to meet current obligations but is the state of having liabilities exceed assets. While Woody's need for capital might indicate inability to meet current obligations, it is but little evidence to support the finding that the Bank should have had knowledge that Woody had liabilities exceeding his assets. The Referee's finding that the Bank had or should have had knowledge of Woody's insolvency is contrary to the clear preponderance of the evidence, and is thus clearly erroneous under Rule 52(a).

Section 57(g) of the Act only requires the surrender of preferences declared to be voidable. Though § 60(a) generally defines a preference, § 60(b) declares to be voidable only those preferential payments made when the creditor at the time of the payment has "reasonable cause to believe the debtor is insolvent." A mere showing of a technical preference under § 60(a) is not sufficient to authorize a turnover order. *Campanella* v. *Liebowitz,* 103 F.2d 252 (3 Cir. 1939); 3 Collier on Bankruptcy, § 60.52.

Thus, as the Trustee did not carry his burden of proving that the Bank knew or had reasonable cause to believe that Woody was insolvent at the time of the payments, these preferences were not voidable under the Act and not subject to the Referee's turnover order. However, even if it could be said that the Bank had reasonable cause to believe the debtor was insolvent, we do not believe these payments could be considered preferences under § 60(a) of the Act.

The purpose of the law of preferences is to secure an equal distribution of the bankrupt's assets among his

creditors of like class. If a transaction, or series of transactions in their entirety do not interfere with this purpose it does not constitute a voidable preference. *Walker* v. *Wilkinson*, 296 Fed. 850, 852 (5 Cir. 1924), cert. denied 265 U.S. 596. There is, of course, a particular class of cases which the statute itself allows an offset against the recovery of a preference. Section 60(c) of the Bankruptcy Act provides:

> "If a creditor has been preferred, and afterward in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

This is in line with the purpose of the law to require the preferred creditor to surrender only the net amount of the benefit he received in excess of that received by other creditors of his class. To the extent that § 60(c) is consistent with these primary equitable principles it should be applied. However, if exclusively applied in the case before us it does not secure an equitable distribution of the assets in accordance with the principles of the Act.

The $16,000.00 new credit was precipitated by the substantial repayment of the $12,000.00 May loan. Should we apply § 60(c) to the extent the $16,000.00 loan remains unpaid the Bank is entitled to set it off against the $12,000.00 in preferential payments. However, as the Bank exercised its right of setting off a checking account maintained in the Bank by the debtor prior to the adjudication of bankruptcy, a literal application of the section would only allow the Bank to setoff under § 60(c) the amount remaining unpaid after the setoff of these mutual debts as probided in § 68(a). As $9,733.88 was set off from the

debtor's account in the Bank, only $6,266.12 actually remained unpaid on the $16,000.00 new credit. Thus, under § 60(c) only $6,266.12 could be set off against the repayment of the $12,000.00 May loan.

This application of § 60(c) results in incomplete relief and consequently in an inequitable distribution of the bankrupt's assets. Had not appellant extended the additional credit, it would stand as an unsecured creditor in the amount of the $12,000.00 May loan, retaining its right of setoff on its debt arising from the checking account. Because of the additional credit appellant stands as an unsecured creditor on $16,000.00. In addition, by the application of § 60(c) appellant must turn over and stand as an unsecured creditor on the $6,266.12 which may not be set off on the preferential repayment of the May 12 loan. Thus the Bank is penalized for the extension of the new credit.

Furthermore, had the Bank waited until after adjudication of bankruptcy to claim its setoff arising from mutual debts, it would have been allowed a full setoff under § 60(c). As appellant had a right under the Act to exercise this mutual debt setoff prior to bankruptcy it is inequitable to penalize the Bank when it so acts by denying it full setoff rights on the new credit. Yet a literal application of § 60(c) results in just such a penalty.

However, §60(c) is not the exclusive remedy governing the offset of credits. *Walker* v. *Wilkinson*, supra. Primary reference should be made to the purposes of the Act to determine if the transactions would interfere with equal distribution of assets among the creditors of a like class. In so holding the court in *Gans* v. *Ellison*, 114 F. 734, 737 (3 Cir. 1902) stated:

> "The net balance in favor of the creditor is the real preference under the law. For only to the extent

> of such net gain does the creditor 'obtain a greater percentage of his debt than any other creditors of the same class.' And so, on the other hand, only to the amount of the net gain to the creditor is the estate of the debtor impaired."

In *Kimball* v. *E. A. Rosenham Co.*, 114 F. 85, 88 (8 Cir. 1902) this Court held:

> "Our conclusion is that the receipt by a creditor of payments upon an account current, in the usual course of business, which are followed by new credits for property delivered to the debtor, which become part of his estate, for which the creditor has not been paid, and which equals or exceeds in amount and in value the payments, does not constitute a preference, under section § 60(a) ** * *."

We recognize that these cases fall into a general "running account rule" which has been widely recognized in bankruptcy law. See, 3 Collier on Bankruptcy, § 57.19 [4.1]. *Atlas* v. *Eastern Yarn Mills, Inc.*, 27 F.Supp. 478 (E.D. N.Y. 1939). Though the facts in the case before us do not show a "running account" we believe the equitable principles that would govern that class of cases are equally applicable to the case before us.

When a creditor in good faith enriches a debtor's estate and this enrichment was caused by the otherwise preferential payment of an outstanding debt, the other creditors are only treated inequally to the extent that the preferential payments exceeded the new advances. If the new credit equals or exceeds the amount of the otherwise preferential payment the other creditors have not been harmed. Consequently, there is no recognizable preference under the equitable principles of § 60(a). How can it be said that one creditor is preferred over the others when immediately upon payment of a $12,000.00 loan the creditor gives the debtor an additional $16,000.00 in credits and

assets? The net result of such a transaction is to enrich the estate of the bankrupt a total of $4,000.00.

Thus, after the alleged preferential payment followed by a new loan the creditors of the bankrupt had $4,000.00 more toward the satisfaction of their claims. Therefore, we cannot see how this transaction of payment followed by new credit of equal or greater amount can be classed as a preference to the Bank. Viewing the transaction as a whole (*Schreiber* v. *Colt*, 80 F.2d 511 (10 Cir. 1935); *Walker* v. *Wilkinson*, supra), not only are the other creditors actually benefited, but the Bank received no greater share of the bankrupt's assets than it would had the bankrupt failed to satisfy the May loan.

As these transactions do not interfere with an equal distribution of the bankrupt's assets among creditors of appellant's class, we believe the repayment of the $12,000.00 May loan did not result in a preference to the Bank as it precipitated new assets flowing to the bankrupt in excess of the amount of the payments. *Wertz* v. *National City Bank of Evansville*, 115 F.2d 65 (7 Cir. 1940), cert. denied 311 U.S. 675; *Gans* v. *Ellison*, supra; *Kimball* v. *E. A. Rosenham Co.*, supra; *Atlas* v. *Eastern Yarn Mills, Inc.*, supra.

SUMMARY

In a recapitulation of this sad episode in the affairs of the bankrupt we are of the opinion that the balance due the Bank on the November, 1957 loan is validly secured by the recorded chattel mortgage of that date and thus constitutes a secured claim. Payment of the May 1959 loan was not a preference in that the payment secured additional assets to the bankrupt. A balance of $4,850.00 is subject to the Referee's turnover order.

As of June 3, 1959, after the repayment of the May, 1959, indebtedness, Woody was indebted to the Bank in the amount of $16,000.00, exclusive of the debt secured by the chattel mortgage of November, 1957. The chattel mortgage given to secure this $16,000.00 was void as to third parties, it not having been recorded as required under the Missouri law. The subsequent chattel mortgage of July 1, 1959 was void as to third parties, which includes the Trustee, as it was given for an antecedent debt. This leaves the Bank in the position of having a $16,000.00 unsecured debt at the time the setoff from Woody's general checking account in the amount of $9,733.88 was made, thus leaving a balance of $6,266.12 properly remaining unpaid of this unsecured indebtedness.

Subsequent to the bankruptcy, the amounts of $550.00 and $866.12 were received from third parties to the bankrupt's operation, and were properly applied to the unsecured indebtedness of the Bank, thus leaving the Bank with an unsecured indebtedness of $4,850.00. This indebtedness was satisfied by the Bank's foreclosure of the voidable July 1 mortgage, and as such, may be recovered by the Trustee.

The Trustee, in addition to asking the Court to sustain all of the Referee's turnover order, asked that the Referee's order be modified to include as a part of that order and in addition thereto an order on the Bank to return the $9,733.88 which it set off from the bankrupt's account. We need no further discussion on this matter for two reasons: 1) the setoff was proper; and 2) this modification would obviously call upon the Bank to return double the amount it actually received in the setoff since the setoff was already ordered repaid by the inclusion in the accounting on the $25,000.00 turnover.

The judgment below is reversed and remanded with instructions to modify the turnover order to find as a preference the payment of $4,850.00 received by the Bank in payment of its unsecured indebtedness, which amount remains an unsecured claim against the bankrupt, subject to allowance upon compliance with the turnover provisions of § 57(g) of the Bankruptcy Act, 11 U.S.C. § 93.

Judgment reversed in part, modified and remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

II

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

IN THE MATTER OF ROBY C. WOODY, d/b/a WOODY MOTOR COMPANY, Bankrupt. } **In Bankruptcy No. 23807**

Petitions for Review of:

I. Various Claimants.

II. First National Bank of Clinton, Mo.

III. The Farmers Bank of Clinton, Mo.

IV. Commercial Credit Corporation.

(District Court's) Memorandum Opinion and Decision on Four Petitions for Review

(Filed January 5, 1966)

Four petitions for review pend in this case. Each petition for review is separate from the others although all relate to orders entered in the same bankruptcy proceeding. Separate judgments on our decisions in regard to each petition for review will be entered in accordance with Rule 58 of the Rules of Civil Procedure.

In connection with all four petitions and before detailed study of the various petitions for review, we made inquiry of counsel as to whether any party wished, pursuant to the

authorization of General Order in Bankruptcy No. 47, to adduce any further evidence or to have any further hearing in connection with any of the four petitions for review.

Counsel for all parties advised us that no further hearing was desired by any party and that all parties wished to have each petition for review submitted on the stipulations, evidence, and briefs filed before the Referee as supplemented by briefs filed in this Court.

Three of the petitions for review will be decided on the merits; the fourth must be recommitted to the Referee with instructions for reasons that we shall state in detail in part IV of this memorandum opinion.

I.

Petition for Review Filed by Various Claimants

Most of the facts involved in this petition for review were stipulated. Additional testimony was heard by the Referee. On the basis of all the evidence the Referee made a specific finding that:

> 1. The above named claimants (hereinafter called joint-owners), except as herein otherwise found, are not creditors of the bankrupt but at all times mentioned here are and were joint-venturers and investors in bankrupt's business as participants in a joint enterprise with bankrupt and have no allowable claim as creditors in this estate and have no right of set-off.

Additional findings concerning the history of each claimant's involvement with the bankrupt were detailed and in paragraph 5 of his order the Referee found and held that:

> 5. A summary of the transactions between the bankrupt and said joint-owners under the "Automobile Purchase Agreement" is that (in addition to the afore-

said payments in money and participation rights) bankrupt agreed to "sell" each joint-owner a new automobile each year in exchange for his old car, for which the joint-owner was to pay bankrupt only the sum of $1.00 over and above the trade-in value of the old car, plus an additional sum to cover the cost of transfer, extra equipment furnished the new car or extra charge for change in car model, but nothing more.

These car transactions were pretended sales for a pretended purchase price which were calculated to, and did, result in bankrupt suffering substantial losses to the detriment of creditors. The exchange of an old car for a new automobile each year for the sum of $1.00 resulted in the joint-owner getting a new car or cars each year for less than the actual factory cost of the new automobile. The losses sustained thereby benefited the joint-owners and depleted bankrupt's assets in fraud of the rights of general creditors. These car exchanges were fraudulent and void preferences, obligations, transfers and conveyances by bankrupt while insolvent to persons interested in bankrupt's business as joint-owners therein when such persons knew or had reasonable cause to know that bankrupt's business was insolvent. By the aforesaid transactions, said joint-owners abstracted, transferred and conveyed to themselves and away from the general creditors bankrupt's money and property and thereby depleted bankrupt's assets and estate for their personal benefit at the expense of the creditors. Said losses are set forth in the separate finding made, infra, with respect to each separate claim.

The claims of the petitioners for review were disallowed and each claimant, or his successor in interest, was ordered to turn over the moneys paid each during bankrupt's stipulated insolvency and each was required to reimburse the estate for the amount of the loss suffered by the bankrupt on the various car trades involved. Such

order either wiped out or subordinated the entire claims of all claimants.

The first question presented in the Referee's certificate is stated as follows:

> 1. Whether such claimants are not creditors of bankrupt but at all times shown by the evidence and as found by the Referee are and were joint-venturers and investors in bankrupt's business as participants in a joint enterprise with bankrupt, and thus have no allowable claims as creditors and have no right of set-off.

That question, as do the other two questions involved in this petition for review that need not be quoted, obviously involves a question of fact.

In *In re Cox*, W.D. Mo. 1965, 244 F. Supp. 430 at 433, we set forth at length our duties as a reviewing court under General Order in Bankruptcy No. 47. We here incorporate what we said there by this reference.

We believe, however, that a word should be added to what we said in *In re Cox* because it has been suggested in some of the briefs filed in this case that inferences drawn by the Referee from stipulated or undisputed facts are not within the scope of the clearly erroneous rule. What we shall say in addition to what we said in *In re Cox* is applicable to all of the petitions for review now before us and shall be so considered by all parties.

In *In re Cox* attention was directed primarily to the standard and scope of our review of findings of fact made by a Referee in Bankruptcy. We there noted that "both Rule 52 (a) of the Rules of Civil Procedure and General Order No. 47 contain the same 'clearly erroneous' standard" (244 F. Supp. at 434). We added that the "standard of review" to be applied by the District Court in its deter-

mination of whether the findings of fact of a Referee are "clearly erroneous" is the same "standard of review [as] that provided by the same 'clearly erroneous' language of Rule 52 (a) as explained by the Supreme Court cases to which we have referred" (244 F. Supp. at 435).

In *In re Cox*, among other Supreme Court cases, we directed attention to *United States* v. *Gypsum Co.*, 333 U.S. 364 at 395 (1948), and to *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278 at 291 (1960). We did not quote in *In re Cox* what the Supreme Court said in those cases about inferences being within the "clearly erroneous" standard of review. We now quote the teaching of those cases in order that our view of the standard that must be applied by a District Court to inferences drawn by a Referee in his findings of fact be in the books.

Both *Gypsum Co.* and *Duberstein* expressly held that the clearly erroneous standard was applicable to and included inferences drawn from the facts as found by the trier of the facts. *Gypsum* held that "in so far as this finding and others . . . are inferences drawn from documents or undisputed facts . . . Rule 52 (a) of the Rules of Civil Procedure is applicable" (333 U.S. at 394).

And *Duberstein* held that "the rule applies . . . to factual inferences from undisputed basic facts . . . as will on many occasions be presented in this area" (363 U.S. at 291).

We think it obvious that if the identical "clearly erroneous" standard of review language in General Order in Bankruptcy No. 47 is read more narrowly than the "clearly erroneous" standard of review language in Rule 52 (a) of the Rules of Civil Procedure a District Court would be required to make a *de novo* review of all orders of a Referee

that are based on inferences drawn by him from stipulated or undisputed factual situations.

We held by implication in *In re Cox* that such was not the purpose or intent of General Order in Bankruptcy No. 47.

We now make clear by adding to what we implied but did not expressly state in *In re Cox* that we believe that a District Court is required by General Order in Bankruptcy No. 47 to accept all factual inferences that a Referee may make in a particular case from stipulated or undisputed basic facts unless such inferences are found to be "clearly erroneous". We further believe that the meaning to be given the "clearly erroneous" standard of review language is that stated in the cases construing both General Order in Bankruptcy No. 47 and Rule 52 (a) of the Rules of Civil Procedure to which we have referred in this case and in *In re Cox.*

What we have here added to what we said in *In re Cox* is, of course, applicable to all the petitions for review that are now before us and shall be so considerered by the parties.

Our examination of the evidence in connection with the Various Claimants' petition for review convinces us that the Referee's findings of fact and the inferences drawn from those are supported by substantial evidence and that we cannot say on that record that such findings are "clearly erroneous" within the meaning of General Order in Bankruptcy No. 47. We further determine that the Referee correctly applied the law to the facts as he found them. See and compare the rationale of *Pepper v. Litton*, 308 U.S. 295 at 303, et seq. (1939).

Accordingly, the order of the Referee of May 28, 1964, the subject of the Various Claimants' petition for review,

should be and is hereby adopted and confirmed. The Clerk shall enter a separate judgment in accordance with Rule 58 of the Rules of Civil Procedure.

II.

Petition for Review Filed by First National Bank of Clinton, Missouri

Most of the facts were stipulated in regard to this petition for review. Additional testimony was received at a hearing. On the basis of the evidence the Referee made special and detailed findings of fact concerning a Reserve Account established by bankrupt at the claimant bank; concerning thirteen chattel mortgages given claimant on used cars owned by bankrupt; concerning other actions taken by bankrupt in regard to other creditors, which the Referee found to sustain the existence of a pre-arrangement between claimant and such other creditors together with the bankrupt in regard to all the transactions taken by each that occurred shortly before bankruptcy, all of which the Referee found to have been done in concert and in disregard of the rights of general creditors; and concerning claimants' action in regard to one car covered by claimant's floor plan mortgage that it permitted GMAC to pick up and keep.

The Referee, on the basis of his detailed findings of fact, concluded that:

> That under the evidence and these findings, claimant received illegal, void, voidable and fraudulent preferences, liens, conveyances, transfers, assignments and encumbrances of bankrupt's money and property totalling $10,630.89, in fraud of creditors, as hereinafter detailed, for antecedent debts, within four months prior to bankruptcy, with knowledge of bankrupt's insolvency or with reasonable grounds to believe that bankrupt was insolvent, knowing that it was being or

would be preferred thereby and that thereby bankrupt was or would be rendered unable to continue in business in violation of Sections 60 and 67 of the Bankruptcy Act (11 USCA, Secs. 96 and 107), to-wit:

(a) Claimant's unlawful set-off of its floor-plan obligations against bankrupt's "Reserve Account", a special purpose account, in the sum of $2,625.89;

(b) Money received by claimant from the sale of 11 cars which it repossessed at night as stated supra, and which it sold for $6,790.00;

(c) The loan value of the car floor-planned with claimant which claimant voluntarily allowed GMAC to pick up and keep under an inferior chattel mortgage in the sum of $1,215.00;

That the premises considered, it is hereby:

ORDERED AND ADJUDGED: That First National Bank of Clinton be and it is hereby ordered and directed to turn over, surrender and pay to Vance Julian, Trustee herein, the sum of $10,630.89.

The petition for review attacks the findings of fact made by the Referee as being unsupported by the evidence and contrary to the evidence submitted by claimant.

As in the case of first petition for review discussed above, we have reviewed the evidence adduced in connection with the turn-over proceeding against the First National Bank of Clinton in accordance with the command of General Order in Bankruptcy No. 47.

The fact that the briefs filed with this Court in connection with this particular petition for review do not cite a single case (claimants did cite Section 303 of 9 C.J.S. Banks and Banking on page 7 of its brief) indicates that claimants' arguments are factual rather than legal.

We are convinced that the Referee's findings of fact and the inferences he made from those facts are supported by substantial evidence. It therefore cannot be fairly said that such findings are "clearly erroneous" within the meaning of General Order in Bankruptcy No. 47. We further determine that the applicable law was correctly applied by the Referee.

Accordingly, the Referee's order of June 10, 1964 relating to the First National Bank of Clinton should be and is hereby adopted and confirmed. The Clerk shall enter a separate judgment in accordance with Rule 58 of the Rules of Civil Procedure.

III.

Petition for Review Filed by The Farmers Bank of Clinton, Missouri

The pattern of the petition for review filed by The Farmers Bank of Clinton is generally the same as that filed by the First National Bank of Clinton. Based on a lengthy stipulation and upon oral testimony the Referee made detailed findings of fact from which he concluded that:

> That under the evidence and the foregoing findings claimant received void, voidable and fraudulent preferences, liens, conveyances, transfers, assignments and encumbrances from the bankrupt totalling $25,000.00 as hereinafter set forth for antecedent debts, within four months prior to bankruptcy, with knowledge of bankrupt's insolvency or with reasonable grounds to believe that bankrupt was insolvent, knowing that it was being or would be preferred thereby, to-wit:
>
> (a) The $12,000.00 May, 1959, loan held by claimant as a general unsecured creditor on which bankrupt paid claimant the sum of $9,000.00;

(b) The $16,000.00 June, 1959, loan held by claimant as a general creditor which bankrupt paid to claimant in full by the transfer of money and property as aforesaid, the sum of $16,000.00—total $25,000.00; that after consideration of all the evidence presented and upon the aforesaid findings, it is hereby

ORDERED AND ADJUDGED:

That Farmers Bank of Clinton be and it is hereby ordered and directed to turn-over, surrender and pay to Vance Julian, Trustee herein, the sum of $25,000.00;

That upon complying with said order pursuant to Section 57 of the Bankruptcy Act (11 U.S.C.A. Sec. 93), the claim of said Farmers Bank of Clinton be and the same is hereby allowed, subject, subordinated and inferior to the rights of general creditors of this estate; and

That if said Farmers Bank of Clinton does not comply with the aforesaid order to pay said $25,000.00, then the claim of said Farmers Bank of Clinton be and the same is hereby disallowed.

We have studied the record and the cases cited by both parties. We are convinced that the findings of fact and inferences made and drawn by the Referee are supported by substantial evidence and that such findings cannot be said to be "clearly erroneous" within the meaning of General Order in Bankruptcy No. 47. We are of the opinion that the Referee correctly applied the law.

Accordingly, the Referee's order of June 10, 1964, relating to the Farmers Bank of Clinton should be and is hereby adopted and confirmed. The Clerk shall enter a separate judgment in accordance with Rule 58 of the Rules of Civil Procedure.

IV.

Petition for Review Filed by Commercial Credit Corporation

An entirely different situation exists in regard to the petition for review filed by Commercial Credit Corporation.

The Referee did not follow the same procedure in connection with his orders of May 28, 1964 that are the subject of that petition for review as he followed in connection with the orders involved in three other petitions for review here involved.

The Referee did not make any findings of fact before he entered the orders involved in Commercial Credit Corporation's petition for review until after those orders had been entered. The Referee's failure to comply with General Order in Bankruptcy No. 47 and with Rule 52 (a) of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by General Order in Bankruptcy No. 37, requires that the matters involved in Commercial Credit Corporation's petition for review be recommitted to the Referee with instructions for the reasons we shall now state.

In *In re Cox, supra,* we discussed but one facet of General Order in Bankruptcy No. 47. The procedures followed by the Referee in connection with the two orders involved in Commercial Credit Corporation's petition for review require that we discuss another facet of that General Order in Bankruptcy and the applicability of Rule 52 (a) of the Rules of Civil Procedure to bankruptcy proceedings by virtue of General Order in Bankruptcy No. 37.

We start, of course, from the factual base that the order of reference of the present bankruptcy proceeding did not contain any special or general direction that the Referee

should not set forth his findings of fact and conclusions of law. General Order in Bankruptcy No. 47 authorizes such an order but no such order was entered in this case.

The Referee's "Order on Trustee's Amended Objections to Allowance of Commercial Credit Corporation's claim and the Trustee's Second Amended Petition for Order to Show Cause," the first order subjected to Commercial Credit Corporation's petition for review, stated:

> The Commercial Credit Corporation's Proof of Claim and Alternative Proof of Claim, the Trustee's Amended Objections thereto, the Trustee's Second Amended Petition for Order to Show Cause, and the Order to Show Cause directed to Commercial Credit Corporation made pursuant thereto, and the Commercial Credit Corporation's Answer to said Order came on for hearing on February 27, 1964; Vance Julian Trustee herein, appearing in person and by his attorneys Phineas Rosenberg and Barkley M. Brock, and Commercial Credit Corporation appearing by T. Bailey Mourning, its Area Manager, and Charles F. Lamkin, Jr., its attorney, and the aforesaid proceedings having been submitted by the parties hereto on Stipulation of Facts and by oral testimony, and the court having duly considered the submission made and being fully advised, does hereby find:
>
> 1. That between July 1 and July 13, 1959, and within four months prior to bankruptcy, Commercial Credit Corporation received void, voidable and fraudulent preferences, liens, conveyances, transfers, assignments and encumbrances from bankrupt totaling $26,538.61 for an antecedent debt with knowledge of bankrupt's insolvency and that it was being preferred thereby, consisting of the following:
>
> (a) Daniel H. and Mary Lou Anderson note for $425.00 dated June 29, 1959, secured by chattel mortgage on 1956 Oldsmobile numbered 568K13621;

(b) John K. Pate retail sales contract for $2,970.00 dated June 29, 1959, for 1959 Oldsmobile numbered 597K16968;

(c) Ernie A. Fisher retail sales contract for $3,385.00 dated June 29, 1959, for 1959 Oldsmobile numbered 599K06739;

(d) Applying bankrupt's reserve account totaling $9,397.00 to its antecedent debt to which Commercial Credit Corporation had no right, title or interest under the "Retail Finance and Reserve Agreement" as against the creditors of this estate;

(e) Oscar Polzin retail sales contract for $4,296.37 dated July 2, 1959 for 1959 Oldsmobile numbered 597K15360;

(f) J. B. Hall retail sales contract for $5,118.01 dated July 3, 1959;

(g) James Floyd Postlethwait retail sales contract for $737.16; and

(h) The credit of $210.07 applied by it against bankrupt's shortage to Commercial Credit Corporation arising on July 7, 1959, as an excess in the transaction involving the sale of 1959 Cadillac numbered 59K104330;

2. That on July 8, 1959 (within four months prior to bankruptcy) Commercial Credit Corporation received and acquired from bankrupt by replevin proceedings void, voidable and fraudulent preferences, liens, conveyances, transfers, assignments and encumbrances consisting of 28 new and used automobiles, specifically listed in the evidence presented here, which Commercial Credit Corporation sold for $73,786.51; that Commercial Credit Corporation received the same on an antecedent debt when it knew that the bankrupt was insolvent and that it was being preferred thereby.

3. That no part of the aforesaid sums of $26,538.61 and said $73,786.51 so obtained and received by Commercial Credit Corporation, as aforesaid, has been turned over or surrendered to the Trustee herein; that unless and until Commercial Credit Corporation turns over or surrenders such sums to the Trustee pursuant to and in compliance with the provisions and requirements of Section 57 of the Bankruptcy Act (11 USCA, Sec. 93), the aforementioned claims of Commercial Credit Corporation should be and stand disallowed but upon the turn-over and surrender thereof in compliance with said Section 57, Commercial Credit Corporation may present its then existing claim to this court for consideration and allowance. It is accordingly

ORDERED AND ADJUDGED: That Commercial Credit Corporation be and it is hereby ordered and directed to turn over, surrender and pay to Vance Julian, Trustee herein, the aforesaid sums totalling $100,325.12; and that upon said Commercial Credit Corporation complying therewith, as hereby ordered, said Commercial Credit Corporation may file and present its then existing claim to this court for consideration and allowance, otherwise the aforementioned claims heretofore filed herein be and the same are hereby disallowed.

The Referee's "Order on Commercial Credit Corporation's Motion to Vacate Order entered December 11, 1963", the second order subjected to Commercial Credit Corporation's petition for review, stated:

The Motion To Vacate Order filed herein by Commercial Credit Corporation directed to this court's Order Approving Compromise made in this cause on December 11, 1963, having been duly considered, it is hereby

ORDERED that the aforesaid Motion to Vacate Order be and the same is hereby denied and that

this court's Order Approving Compromise be and the same is and shall remain in full force and effect as entered on December 11, 1963.

After holding some sort of a hearing subsequent to the entry of those two orders, but before the petition for review was filed, the Referee prepared and filed his certificate on Commercial Credit Corporation's petition for review, as required by Section 39(a) (8) of the Bankruptcy Act (11 U.S.C.A. 867 (a) (8)). That section provides that:

> 39. *Duties of Referees.* a. Referees shall . . . (8) prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them, together with a statement of the questions presented, the findings and orders thereon, the petition for review, a transcript of the evidence or a summary thereof, and all exhibits.

After a statement of five questions presented by the petition for review, the Referee's Certificate contained a fourteen page section entitled "Evidence and Findings Thereon."

The data contained in that section of the Referee's Certificate cannot be said to be the findings of fact required of a Referee by General Order in Bankruptcy No. 47 and Rule 52 (a) of the Rules of Civil Procedure. The section of the certificate entitled "Evidence and Findings thereon" was not written until long after the order of May 28, 1964 had been entered.

Nor can that section of the Referee's certificate be said to be a "summary [of the] transcript of the evidence" within the meaning of Section 39 (a) (8) because, on its face, it purports to make findings of fact and to state conclusions of law in regard to the two orders entered some four months earlier.

On page 10 of the Trustee's brief it is stated: "In the Referee's aforementioned order dated May 28, 1964, and in the Referee's Certificate On Petition For Review Filed by C.C.C., the Referee carefully detailed and digested the pleadings, the issues, the oral evidence, the stipulated and admitted facts and then made his findings of fact which he supported with record references." (p. 10 Trustee's brief).

As is apparent from the Referee's orders of May 28, 1964, which we have set forth in full, the Referee did not detail and digest the pleadings, issues, the oral evidence, the stipulated and admitted facts in those orders. Nor did he make in those orders anything other than findings of ultimate facts in highly conclusory language.

In recognition of the necessity to legitimate the findings of fact the Referee attempted to make in his certificate above, the Trustee suggests, again on page 10 of his brief, that:

> Both the order now under review and the Referee's said certificate are to be considered. See *In re D.I.A. Sales Corporation,* 339 F. 2d 175, l. c. 180, par. 7. (CA-6).

We do not believe that suggestion is tenable. We recognize, of course, that *In re D.I.A. Sales Corporation,* without the citation of any authority, apparently holds that:

> We find no merit in appellant's contention that the order of the referee was defective in that it failed to set forth his findings of fact and conclusions of law. In the first footnote we have quoted from the findings of fact and conclusions of law contained in the referee's certificate on the petition for review. We hold that the certificate of the referee contained adequate findings of fact and conclusions of law and that it was not

necessary for him to set forth these same findings and conclusions in the order. (339 F. 2d 180).[1]

If *In re D.I.A. Sales Corporation* and *In re Berman & Company* represent the considered rule of decision in the Sixth Circuit, we must respectfully refuse to follow those cases. Whatever may be the rule in the Sixth Circuit we are convinced that the settled rule of decision in the Eighth Circuit requires that the matters involved in the Commercial Credit Corporation's petition for review be recommitted to the Referee with instructions that he comply with the requirements of General Order in Bankruptcy No. 47 and Rule 52 (a) of the Rules of Civil Procedure. We now state our reasons.

General Order in Bankruptcy No. 47 provides:

> Unless otherwise directed in the order of reference the report of a referee . . . shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Any question as to whether a Referee is required to "set forth his findings of fact and conclusions of law" in connection with orders other than a special report under a special reference[2] is removed by General Order in Bank-

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1. See also *In re Berman & Company*, 6 Cir. 1965, 343 F. 2d 125, at 126, where, apparently, and again without the citation of any authority, the Sixth Circuit approved the inclusion of findings of fact and conclusions of law in a referee's certificate. *In re D.I.A. Sales Corporation* was cited in that case, in connection, however, with another proposition.

2. See the first full paragraph in the second column of Referee Heisey's Comment in 35 Journal of the National Association of Referees in Bankruptcy, p. 39 (April, 1961), to which Judge

ruptcy No. 37 and Rule 52 (a) of the Rules of Civil Procedure. The former provides:

> In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding.

And Rule 52 (a) consistently provides in part that:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

The Eighth Circuit recognized at an early date that "the referee, unless otherwise directed, 'shall set forth his findings of fact and conclusions of law'." *Arkansas Oil & Mining Co.* v. *Murray Tool & Supply Co.*, 8 Cir. 1942, 127 F. 2d 564 at 566. See also *Troutwein* v. *Mandel*, 8 Cir. 1942, 127 F. 2d 567 at 569, where it was recognized that under

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Blackmun directed attention in footnote 1 on page 4 of his opinion in *O'Reiley* v. *Endicott-Johnson Corporation*, 8 Cir. 1961, 297 F. 2d 1, where some question is raised. We agree with much of what Referee Heisey stated in his comment concerning the Eighth Circuit rule except for the paragraph noted. We believe, however, that the applicability of Rule 52 (a) makes the point raised in the cited paragraph a moot question.

General Order in Bankruptcy No. 47, "there must be findings of fact and conclusions of law made by the referee and covering the essential issues."

In *U. S. Machinery Movers* v. *Beller*, 8 Cir. 1960, 280 F. 2d 91 at 94, the Eighth Circuit expressly held that "Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., (which, by virtue of General Order in Bankruptcy 37, is applicable to proceedings under the Bankruptcy Act) requires that the court shall find the facts specially and state its conclusions of law thereon." Of course, the word "court" in that quotation refers to the Referee. Under a general reference, the Referee, by definition, acts as a court; not as some sort of special master. See Section 1(9) of the Bankruptcy Act (11 U.S.C.A. § 1 (9)) which provides that "'court' shall mean the judge or the referee of court of bankruptcy in which the proceedings are pending."

The late Judge Sanborn further stated in *U. S. Machinery Movers* that:

> Our understanding is that a district judge called upon to review a referee's order, is entitled to have from the referee an adequate and accurate statement of the facts and the law upon which he relied in making his order. It is also our understanding that, when an appeal is taken from an order such as that here involved, this Court must have a record which discloses the exact factual and legal basis for the order under review. See and compare, *In re Rockford Baseball Club, Inc.*, 7 Cir. 201 F. 2d 685; *In re Cesari*, 7 Cir. 217 F. 2d 424, 427-428.

In re Rockford Baseball Club, 7 Cir. 1953, 201 F. 2d 685, cited with approval by the Eighth Circuit in *U. S. Machinery Movers*, involved a case in which the referee made no specific findings of fact. After holding that Rule 52 (a)

was made applicable to bankruptcy proceedings by General Order in Bankruptcy No. 47, that case held at page 686:

> This court has many times held that a fair compliance with Rule 52 (a) is mandatory. While findings in elaborate detail are neither required nor desirable, "They should be so explicit as to give the reviewing court a clear understanding of the basis of the trial court's decision * * * and to enable it to determine the ground upon which the trial court reached its conclusion." *Maher* v. *Hendrickson*, 7 Cir., 188 F. 2d 700, 702.

In re Rockford Baseball Club emphasized that the making of ultimate findings of fact without also making supporting subsidiary findings of fact is meaningless and that the making of ultimate findings alone does not comply either with General Order in Bankruptcy No. 47 or with Rule 52 (a) of the Rules of Civil Procedure.

The court held that what the Supreme Court said concerning the duties of a District Court in regard to making findings of fact is applicable to the findings that must be made by a Referee. Quoting from *Kelly* v. *Everglades Drainage District*, 319 U.S. 415 (1943) at 421-22, that court held at page 687:

> It is not the function of this [reviewing] court to search the record and analyze the evidence in order to supply findings which the trial court [referee] failed to make. * * * the nature of the evidentiary findings sufficient and appropriate to support the court's [referee's] decision * * * is for the trial court [referee] to determine in the first instance in the light of the circumstances of the particular case. We hold only that there must be findings * * * which are sufficient to indicate the factual basis for the ultimate conclusion. (Brackets ours).

The appropriate action to be taken by a District Court in a case in which the Referee fails to comply with General Order No. 47 and Rule 52 (a) was stated as follows:

> The order of the District Court is reversed and the cause remanded, with directions that the cause be remanded to the referee in bankruptcy with instructions that the referee make appropriate findings of fact, in conformity with this opinion, and then state his conclusions of law thereon.

See also *In re Cesari*, 7 Cir. 1954, 217 F. 2d 424, the second case cited with approval by the Eighth Circuit in *U. S. Machinery Movers*, in which the cause was reversed and remanded to the District Court with instructions to remand to the Referee in order that his failure to make both ultimate and subsidiary findings be corrected. And see *O'Rieley* v. *Endicott-Johnson Corporation*, 8 Cir. 1961, 297 F. 2d 1, in which the Eighth Circuit reiterated that "it has been held specifically that Rule 52 (a) applies to bankruptcy proceedings," cited and relying on both *U. S. Machinery Movers* and *In re Rockford Baseball Club*.

The decision in *Endicott-Johnson Corporation* underlines the paramount importance of a referee's findings of fact. That case resolved any doubt that may have existed "that in this circuit the clearly erroneous standard is to be applied to the referee's findings and not to those of the district court." See also and compare *Standard Electronics Corporation* v. *Kenneally*, 8 Cir. 1964, 336 F. 2d 394 at 396. The prime importance of a referee's findings of fact and the pattern for review of those findings is now firmly established in the Eighth Circuit by the cases just cited.

Under General Order in Bankruptcy No. 47 the District Court is required to accept a referee's findings of fact unless it determines that such findings are clearly erroneous.

And the Court of Appeals, by virtue of Rule 52 (a), is enjoined from setting aside the referee's findings of fact unless it finds that such findings are clearly erroneous. It is obvious that a referee's findings of fact, both ultimate and subsidiary, are the very foundation upon which the proper administration of the Bankruptcy Act rests and that anything short of full and careful compliance with the rules may not be justly countenanced.

The rationale of *In re Peoria Braumeister Co.*, 7 Cir. 1943, 138 F. 2d 520, illustrates the reason why a referee's duty to make findings of fact is not discharged by an attempt to include findings of fact in the certificate required by Section 39 (a) (8) of the Bankruptcy Act (11 U.S.C.A., § 67 (a) (8)).

In that case the referee did make some findings of fact and stated certain conclusions of law in support of his order disallowing a secured claim. A petition for review was promptly filed. The referee, some five months later, attempted to make additional findings of fact by including them in his certificate on the petition for review. In the District Court the petitioner for review unsuccessfully moved to strike the additional findings made in the referee's certificate and appealed.

The Court of Appeals held that the motion to strike should have been granted because "it was improper for the referee to make additional findings of fact in his certificate after the petition for review had been filed" (138 F. 2d at 522). In explanation of its holding, that court stated:

> Neither § 39, sub. a(8) of the Bankruptcy Act, 11 U.S.C.A. § 67, sub. a(8), nor § 39, sub. c, 11 U.S.C.A. § 67, sub. c, . . . contemplates that a referee may make additional findings of fact some five months after a

petition for review has been filed. Instead, § 39, sub. c, requires that the petition for review set forth the alleged errors committed by the referee. This is obviously impossible if the referee is allowed to make additional findings after the petition is filed (138 F. 2d at 522).

For the reasons stated we find that the Referee was not authorized by law to make any findings of fact in his certificate and therefore we refuse to review the findings of fact made in the certificate filed by the Referee in connection with Commercial Credit Corporation's petition for review. We expressly refuse to follow what is apparently the rule of decision of the Sixth Circuit as stated in *In re D.I.A. Sales Corporation* and apparently applied in *In re Berman & Company* because we are of the opinion that such a rule ignores the controlling force of General Orders in Bankruptcy Nos. 47 and 37, and Rule 52 (a) of the Rules of Civil Procedure.

Therefore, and pursuant to General Order No. 47, we recommit the matters involved in Commercial Credit Corporation's petition for review to the Referee for further proceedings consistent with this memorandum and order and the instructions we now state.

The Referee is instructed to "find the facts specially and [to] state separately its conclusions of law thereon and [to] direct the entry of the appropriate judgment" in connection with the orders which were the subject of Commercial Credit Corporation's petition for review, all in compliance with Rule 52 (a) of the Rules of Civil Procedure.

The Referee is instructed to conduct appropriate proceedings in order that the record be clear in regard to the evidence adduced at the June 8, 1964 hearing and in regard to the depositions taken in Cases No. 12427-1 and 12439-1 that pended earlier in this Court.

We have read the exhibits and the depositions that are apparently a part of the record, and without expressing any opinion in regard to the testimony contained therein, we do indicate that it is our judgment that a great deal of relevant evidence is contained in those exhibits and depositions to which no reference has been made either by the Referee or the parties.

As we have indicated above, we believe the Referee is required not only to make ultimate findings of fact but that he is also required to make sufficient subsidiary findings so that the theory and rationale upon which the Referee's orders are based is made apparent. He is instructed to do so.

The Referee is further instructed that his conclusions of law shall not only be stated separately but that they shall also be stated in sufficient detail for the reviewing courts to fully understand exactly what case authority and sections of the Bankruptcy Act are involved and relied upon and to understand the rationale of the Referee's application of the law to the facts as he shall find them.

The Referee is to understand, of course, that he may, in accordance with Rule 52 (a), file an opinion or a memorandum of decision and that such shall be considered to be sufficient if the requisite findings of fact and conclusions of law appear therein.

The Referee is also to understand that nothing we have said is to be taken to prevent him from requiring counsel to prepare and submit to him suggested findings of fact and suggested conclusions of law, supported by specific references to the record and by citation of appropriate legal authority to aid him in the discharge of his duty. See discussion of Findings of Fact, Conclusions of Law and Judgment, Seminar on Practice and Procedure,

28 F.R.D. at 268-282. See also Carter and Wagner: Findings of Fact, II Modern Practice Commentator 109 (August 1964), particularly at 122, where bankruptcy proceedings are discussed.

Indeed, the Referee may find it desirable to require counsel to file additional briefs on specific points not heretofore briefed either before him or this court. The impact, if any of the case of *Commercial Credit Corporation* v. *Blau,* (Mo. Sup. Ct. 1965) 393 S.W. 2d 558, is an example of such a specific point. Our instructions are not intended to prohibit such action.

Consideration of that case may, we do not rule that it does, require the detailed analysis of additional portions of the record not heretofore analyzed by either party. And it may even require the taking of additional testimony. What we have said here is not to be considered as any limitation upon the Referee to so proceed should he believe it necessary to do so.

In fact, if we were the Referee in this case, upon receiving the case back on remand, we would order a pretrial conference pursuant to Rule 16 of the Rules of Civil Procedure, in order to simplify and identify the real issues, both factual and legal. We would also probably require that the parties stipulate many of the ultimate facts about which there is obviously no dispute. Those matters, of course, are matters for the Referee to determine. We mention them only to make clear that our recommitment instructions do not prohibit such procedure.

For the reasons stated, and pursuant to General Order in Bankruptcy No. 47, the matters involved in Commercial Credit Corporation's petition for review should be and are hereby ordered recommitted to the Referee with instruc-

tions that he proceed further in accordance with the instructions stated herein.

The Clerk shall enter a separate judgment in accordance with Rule 58 of the Rules of Civil Procedure.

/s/ John W. Oliver
District Judge

Kansas City, Missouri
January 4, 1966

III

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

IN THE MATTER OF ROBY C. WOODY, d/b/a WOODY MOTOR COMPANY, Bankrupt. } **In Bankruptcy No. 23807**

(Referee's) Order on Trustee's Objections to Allowance of Claim of Farmers Bank and on Petition for Order to Show Cause Directed to Said Bank.

(Filed June 10, 1964)

The Trustee's Objection To Allowance Of the Claim Of Farmers Bank of Clinton, his Petition For Order To Show Cause directed to said bank, the Order To Show Cause made pursuant thereto, and said bank's Answer to such Order, came on for hearing on March 30, 1964; Vance Julian, Trustee herein, appearing in person and by his attorney, Phineas Rosenberg, and Farmers Bank of Clinton (herein called claimant), appearing by Harry F.

Finks, its president and by John G. Killiger and Julius Wall, its attorneys, and the aforesaid proceedings having been submitted on stipulated facts and oral testimony, and the Court having duly considered the submission made and being fully advised, does hereby find:

1. That the six month $16,000.00 loan dated November 22, 1957, made by claimant to bankrupt was evidenced by an instrument designated Note and Chattel Mortgage in which the security is described as: "All machinery and shop equipment, Oldsmobile special tools, Cadillac special tools, furniture, fixtures and parts bins" and the following moving stock of merchandise is described as: "parts, accessories, oil and grease, and paint"; that the installments due on said six months note and the payments as made thereon are as follows:

Due Dec. 22, 1957	$ 1000.00	paid	Dec. 24, 1957	$1000.00
Due Jan. 22, 1958	1000.00	paid	Jan. 21, 1958	1000.00
Due Feb. 22, 1958	1000.00	paid	Feb. 24, 1958	1000.00
Due Mar. 22, 1958	1000.00	paid	Mar. 24, 1958	1000.00
Due Apr. 22, 1958	1000.00	paid	Apr. 25, 1958	1000.00
Due May 22, 1958	11000.00	paid	May 22, 1958	1000.00
			June 23, 1958	1000.00
			July 25, 1958	1000.00
			Aug. 27, 1958	1000.00;

that on August 27, 1958, the unpaid balance on said note was $7,000.00; that claimant therafter allowed the principal payments due on said note to remain past due and in default, but collected interest thereon monthly until April 30 and May 7, 1959, when bankrupt made two $500.00 payments and reduced said indebtedness to $6,000.00;

2. That in May and June, 1959 (almost two years later) claimant made two loans to bankrupt; the first for $12,000.00 due in one week; the second for $16,000.00 due on demand; both loans were evidenced by notes secured

by *unrecorded* chattel mortgages which made no reference to the prior existing November 1957 mortgage and included no property described in said prior mortgage; that $3000.00 of the June 1959 loan was used to pay the unpaid balance due on the antecedent May 1959 loan, and the remaining $13,000.00 was deposited in bankrupt's bank account; that the security described in the May and June 1959 mortgages consisted of listings of used cars with no detailed identification of such cars which mortgages were delivered to claimant *without* certificates of title to said cars; that under said May and June 1959 loans and mortgages, claimant was and is a general unsecured creditor;

3. That said May and June, 1959, loans were temporary financing by claimant until bankrupt could obtain a long term capital loan from Commercial Credit Corporation or some other source; that claimant was informed of and knew bankrupt's financial condition and that bankrupt needed the long term capital loan; that at a meeting held on June 30, 1959, Commercial Credit Corporation's representative informed bankrupt and claimant that his company would not make such a loan until an audit was made of bankrupt's business and bankrupt had complied with other requirements for a capital loan; that thereupon claimant seized bankrupt's bank account in the sum of $9733.88 and credited that amount as a payment on the aforementioned June 1959 loan; that from all the evidence presented, the uniformity of action between claimant and the First National Bank of Clinton (another claimant herein) acting together and in unison and jointly with bankrupt and his active and extensive co-operation with both of said banks as stated herein, infra, the court finds a collusive pre-arranged and planned formula of action existed between them prior to bankruptcy with respect to the concurrent seizure of bankrupt's bank accounts in such

banks, with respect to bankrupt's transfer of free and clear assets to each of said banks without consideration on the eve of bankruptcy (to help such banks as he testified) and with respect to bankrupt's permitting such banks to jointly enter his place of business together on the same night and to remove therefrom the free and clear assets almost immediately after receipt from bankrupt of the chattel mortgages covering the property which each removed, also as stated herein, infra;

4. That on June 27, 1959, bankrupt's bank balance in claimant bank was $34.84; that in the next three days bankrupt made the following deposits in claimant bank to wit:

June 29, 1959 (one day prior to said seizure)	$10,581.15
June 29, 1659 (one day prior to said seizure)	762.15
June 30, 1959 (the day of the seizure)	480.04;

that by June 30, 1959 (in said three days), bankrupt had built up his bank balance in claimant bank under prearrangement to $11,197.14 from which claimant paid checks totalling $1463.26 and then seized the balance of $9733.88 as a set-off against its unsecured debt (June 1959 loan) leaving the unpaid balance due thereon of $6266.12;

5. That on July 1, 1959, the next day after claimant had seized his bank account as aforesaid bankrupt notified claimant that Commercial Credit Corporation was going to close his business, and to help the bank (as he testified) without receiving any money or other consideration therefor, bankrupt voluntarily gave claimant a new note and chattel mortgage for $6266.12, due on demand, covering the aforesaid unpaid balance due on the unsecured June 1959 loan, the security described in said July 1, 1959 mortgage was 16 free and clear used cars which bankrupt specifically and carefully identified in all necessary details by year, number, make, style and model and with the de-

livery of said mortgage to claimant he also delivered to it the certificate of title to said cars; that said voluntary July 1, 1959 mortgage so given to claimant refers to the prior existing June 1959 unrecorded mortgage but does not refer to the prior existing November 1957 recorded mortgage and does not describe any property described in said prior November 1957 mortgage;

6. That said voluntary July 1, 1959 mortgage was filed for record on July 2, 1959 (the next day) and on July 4, 1959, the following Saturday—a national holiday—or on July 5, 1959, the following Sunday, bankrupt permitted claimant and said First National Bank to enter his place of business jointly between the hours of 6:00 p. m. and midnight and remove 15 of said cars therefrom at night and under the cover of darkness, which cars claimant sold on July 11, 1959 (two days prior to bankruptcy), for $4500.00, and credited that amount as a payment on said July 1, 1959 note; that bankrupt paid said voluntary July 1, 1959 note in full by the following other payments, to-wit:

July 10, 1959 (3 days *prior* to bankruptcy)	$550.00
July 14, 1959 (1 day *after* bankruptcy)	866.12
July 14, 1959 (1 day *after* bankruptcy)	350.00;

7. That on July 1, 1959, also bankrupt gave Commercial Credit Corporation a demand note for $42,447.78 to cover his shortage to that company and secured that note with a chattel mortgage describing the same property as is described in claimant's prior existing November 1957 mortgage; that said July 1, 1959, mortgage to Commercial Credit Corporation provided that it was "subject to first chattel mortgage of record to Farmers Bank of Clinton" (claimant here) and was filed for record on July 2, 1959; that on the following July 8, 1959, Commercial Credit Corporation, acting under this July 1, 1959, mortgage, by writ

of replevin issued by the United States District Court for the Western District of Missouri, replevined said property from bankrupt which was subject to claimant's prior existing November 1957 mortgage and also replevined 38 automobiles covered by other mortgages and removed all of the aforementioned property from bankrupt's place of business;

8. That bankrupt was insolvent as of December 31, 1957, by $37,990.10, as of December 31, 1958 by $126,933.73 and as of May 31, 1959 (approximately 6 weeks prior to bankruptcy) by $149,072.73;

9. That concurrently with the foregoing transactions with claimant, bankrupt also arranged exact and similar transactions with the First National Bank of Clinton (another claimant) whereby it also was to, and did, seize bankrupt's bank account and also was to, and did, receive notes and chattel mortgages from bankrupt without money or other consideration for an antecedent debt; that claimant and said First National Bank of Clinton co-operated and acted together jointly and in unison with each other and with the bankrupt in seizing bankrupt's bank balances, in going into bankrupt's place of business together during the night of July 4 or July 5, 1959, and in removing therefrom the cars covered by their respective mortgages, which each had received as aforesaid;

10. That with respect to the property described in the November 1957 mortgage and in the May and June 1959 unrecorded mortgages, bankrupt at all times had possession thereof and unrestricted and unlimited power to sell such property and keep the money received from the sale thereof without claimant's control or supervision and at all times retained and kept possession of such property, including all automobiles and the certificates of title thereto for the purpose of sale;

11. That the November 1957 mortgage contained a default clause which empowered claimant to take possession of the property described therein, with or without legal process, and to sell the same at public or private sale, with or without notice, in Henry County, Missouri, or, at its option, in any county where said property may be found:

(a) If default be made in the payment of any installment of the note or any part thereof or the interest thereon, when due; *or*

(b) If bankrupt, or any person in his behalf, shall sell or attempt to sell, encumber, or remove said mortgaged property or any part thereof from Henry County, Missouri, without claimant's written consent; *or*

(c) If the personal property described in said mortgage or any part thereof shall be seized on legal process; *or*

(d) If claimant shall for any reason deem itself insecure;

12. That each of the default events listed in the default clause had occurred and existed at the time of bankruptcy; that for a period approximating two years prior to bankruptcy and despite such defaults and prior rights, claimant made no effort to act promptly (under the powers granted to it in said default clause) to foreclose its lien or exhaust its rights or otherwise protect itself with respect to the property described in its said November 1957 prior and recorded mortgage; that claimant was passive as to its claim thereunder and permitted the same to lie dormant for said two year period and did nothing as to bankrupt's breaches and defaults of said prior mortgage, as to bankrupt's debt to claimant, or as to its enforcement rights under said mortgage except to file a claim in this proceeding after

bankruptcy; that by allowing its claim to lie dormant, as stated, and by its passive and "do nothing" policy during said two year period with respect to bankrupt's defaults of said prior and past due mortgage, as stated, and by claimant's unexplained action in not referring to the long past due and prior November 1957 mortgage as continuing security in claimant's later May, June and July 1959 mortgages, claimant obscured and veiled its priority rights to the detriment of the rights of general creditors of this estate and by reason thereof claimant's said claim became and is inferior and subordinate to the rights of such general creditors;

13. That under the evidence and the foregoing findings claimant received void, voidable and fraudulent preferences, liens, conveyances, transfers, assignments and encumbrances from the bankrupt totalling $25,000.00 as hereinafter set forth for antecedent debts, within four months prior to bankruptcy, with knowledge of bankrupt's insolvency or with reasonable grounds to believe that bankrupt was insolvent, knowing that it was being or would be preferred thereby, to-wit:

(a) The $12,000.00 May, 1959, loan held by claimant as a general unsecured creditor on which bankrupt paid claimant the sum of $9000.00;

(b) The $16,000.00 June, 1959, loan held by claimant as a general creditor which bankrupt paid to claimant in full by the transfer of money and property as aforesaid, the sum of $16,000.00—total $25,000.00; that after consideration of all the evidence presented and upon the aforesaid findings, it is hereby

Ordered and Adjudged:

That Farmers Bank of Clinton be and it is hereby ordered and directed to turn-over, surrender and pay to Vance Julian, Trustee herein, the sum of $25,000.00;

That upon complying with said order pursuant to Section 57 of the Bankruptcy Act (11 U.S.C.A., Sec. 93), the claim of said Farmers Bank of Clinton be and the same is hereby allowed, subject, subordinated and inferior to the rights of general creditors of this estate; and

That if said Farmers Bank of Clinton does not comply with the aforesaid order to pay said $25,000.00, then the claim of said Farmers Bank of Clinton be and the same is hereby disallowed.

Made at Kansas City, this 10 day of June, 1964.

Harry F. Murphy
Referee in Bankruptcy.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 725

VANCE JULIAN, TRUSTEE IN BANKRUPTCY OF ROBY C. WOODY, d/b/a WOODY MOTOR COMPANY, BANKRUPT,
Petitioner,

vs.

THE FARMERS BANK OF CLINTON, MISSOURI,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals appears at pp. A1-A28 inclusive of the Petition for Writ of Certiorari (hereinafter "Pet.").

QUESTION PRESENTED

Has petitioner shown any grounds for granting a writ of certiorari?

STATUTES AND RULES INVOLVED

Rule 19, Rules of the Supreme Court of the United States:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> * * *
>
> "b. Where a court of appeals has rendered a decision in conflict with a decision with another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, * * * as to call for an exercise of this court's power of supervision."

Rule 10(c), Rules of the U. S. Court of Appeals for the Eighth Circuit:

> "Rule 10(c). *Supplement to Printed Record by Appellee.* In case the appellee or respondent shall be of the opinion that the printed record submitted by the appellant or petitioner is inaccurate or omits essential portions of the entire record, he may file and serve with his answering brief a separately printed supplement to the printed record, carefully indexed, containing such additional portions of the record as he deems essential for consideration by the court in deciding the case.

The evidence contained in a printed supplement may be in the form in which it appears in the original record unless the appellee or respondent elects to reduce it to narrative form."

STATEMENT

Respondent is dissatisfied with Petitioner's Statement (Pet. pp. 11-19). It is grossly violative of this Court's Rule 23(1)(e) calling for a "concise statement of the case containing the facts material to the consideration of the questions presented." It repeatedly goes outside the record by referring to alleged facts which do not appear in the record. Further it attempts to argue matters both inside and outside the record, rather than confining itself to the record and simply stating facts which appear therein. Respondent calls this Court's attention to paragraph No. 4 of its Rule 23 which states that failure to present with "accuracy, brevity and clearness, whatever is essential to a ready and adequate understanding" of the relevant issues will be sufficient reason for denying the petition.

For our Statement, we incorporate herein the statement of facts of the Eighth Circuit Court of Appeals which appears in its Opinion (Pet. pp. A2-A6).

ARGUMENT—REASONS FOR DENYING WRIT

1. In that portion of his argument denoted No. 1(a) and (b) (Pet. pp. 20-25), petitioner basically contends that the record of the entire bankruptcy proceedings, stretching out over some six years, constitutes the "entire evidence" which, he states, the Eighth Circuit did not have before it when it concluded that most of the Referee's findings were "clearly erroneous."

First, it is clear from the record that the "entire evidence" concerning this matter involving respondent was in fact before the Eighth Circuit. The District Court's opinion specifically states that each of the four petitions for review, of which this matter was one, is "separate from the others although all relate to orders entered in the same bankruptcy proceeding." (Pet. p. A29). The District Court states it is entering "separate judgments . . . in regard to each petition for review."

Second, if the "entire evidence" was not before the Eighth Circuit, petitioner has no one to blame but himself; he cannot correct the alleged omission at this stage. Under Rule 10(c) of the Rules of the Eighth Circuit Court of Appeals, it was petitioner's duty to designate any additional matters which he felt were omitted from the Record (Vol. I) filed by respondent and which he felt should be part of the record in this case. Petitioner did in fact file a Supplemental Record (Vol. II) which was in addition to the Record filed by Respondent (appellant below). Although the Supplemental Record was extensive, it does not include what petitioner now claims is the "entire evidence." He now wants another opportunity to add to the record.

Third, what petitioner now claims is the "entire evidence" contains matters irrelevant to the issues of this case, and was developed in proceedings to which respondent was not a party, of which respondent was never notified, and in which respondent did not participate. All for the excellent reason that said proceedings had nothing to do with the subject-matter of the cause now before the Court and which was ruled upon by the Eighth Circuit. Certain principles are basic to Anglo-Saxon jurisprudence, i. e., the right of cross-examination; the right to offer controverting evidence; the right to object to inadmissible evidence; the right to participate in a hearing involving one's interests;

and the right of representation by counsel. It is essential that respondent have been a party to the various proceedings which petitioner would now have this Court consider. There is nothing in the record to indicate respondent was a party to those other proceedings which petitioner now claims constitute the "entire evidence." Respondent did not participate in those hearings. Petitioner steps outside the record when he claims that what he states is the "entire evidence" was developed in "joint hearings." There is nothing in the record to indicate respondent was allowed to—or did—participate in such "joint hearings." There was no evidence common to respondent and the other parties involved, and there was no agreement to allow such evidence to apply to this matter. This is made crystal-clear by the District Court's own statement that each of the four petitions for review constituted a separate and distinct matter, entirely different from each of the other three.

A good example of what petitioner is here attempting is his recitation at pages 19 and 24 of his Petition of certain "facts" or "evidence." (Pet. p. 19, Paras. Nos. 5 and 6; p. 24). He cites these "facts" to a "supplemental stipulation" to which respondent was not a party and which is not part of the Record before the Eighth Circuit. Is respondent to be bound by a stipulation to which it was not even a party? Petitioner would have this Court believe so.

We respectfully submit the Eighth Circuit properly applied the "clearly erroneous" rule to the "entire evidence" which it properly had before it, and which constituted all the evidence relevant to the cause it was considering.

Further, petitioner fails to demonstrate why the alleged failure to consider the "entire evidence" should be grounds for this Court's granting a writ of certiorari in this cause.

2. Petitioner's argument on the four questions which he has designated Nos. 2(a), (b), (c) and (d) (Pet. pp. 25-36) is reargument of what he said in the court below. It deals solely with what petitioner now alleges are errors of law. Such supposed errors of law were allegedly committed in ruling on the particular set of facts involved here. The Eighth Circuit's reasoning appears in its opinion (Pet. pp. A7-A28) and needs no defense or further elaboration here. The grounds for its decision are lucidly and logically set forth. They are based on ample, clear precedent and achieved justice in this case. We need not argue them again. Petitioner does not present any grounds which this Court has stated, both in its Rule 19 and in its decisions, will be considered in its decision as to the granting of a writ of certiorari. Petitioner is simply rearguing matters which the Eighth Circuit has decided in its opinion; he demonstrates no reason to grant certiorari. He would have this Court review the Eighth Circuit's rulings of law which are limited to this distinctive fact situation.

This Court has stated its use of writs of certiorari is designed to serve two purposes: To secure uniformity and to decide questions of great importance. *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922; *In re Woods*, 143 U.S. 202, 12 S.Ct. 417, 36 L.Ed. 125. In *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614, this Court stated, at p. 73:

> ". . . we have considered anew whether this case is one in which 'there are special and important reasons' for granting the writ of certiorari, as required by Supreme Court Rule 19.
>
> "This rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper

functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. In illustrating the character of reasons which may be deemed 'special and important', the Rule refers to cases.

* * *

"A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (Magnum Import Co. v. Coty, 262 U.S. 159, 163, 67 L.Ed. 922, 924, 43 S.Ct. 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, September 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proceedings American Law Institute 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

We respectfully submit petitioner has not demonstrated in his petition for a writ of certiorari any "special and important reasons" why this Court should undertake a review of the Eighth Circuit's decision.

Petitioner also attempts to argue the facts instead of simply stating them; in addition, he attempts to argue alleged facts outside the record. Somewhat inconsistently (Pet. pp. 22, 28), petitioner argues for the "inherently improbable" rule which he states should be applied here. Such "inherently improbable" rule implicitly concedes the total lack of evidence to justify the findings for which petitioner argues. If anything, this argument confirms the

Eighth Circuit's refusal to swallow what it felt were the "clearly erroneous" findings of the Referee in Bankruptcy.

Petitioner cites no grounds for invoking this Court's discretion to grant a writ of certiorari. It is respectfully submitted the petition should be denied.

3. In regard to petitioner's argument on those four questions numbered 3(a), (b), (c) and (d) (Pet. pp. 36-49) in petitioner's brief, petitioner again argues at great length questions of law and alleged errors, supposedly committed by the Eighth Circuit, rather than showing to this Court grounds for the requested granting of a writ of certiorari. As stated above, the Eighth Circuit's grounds for decision are set forth in its Opinion. They will not be reargued here. Petitioner is simply rearguing the case which has already been decided. He does not demonstrate the applicability of any grounds for exercising this Court's discretion in granting a writ of certiorari. In considering a petition for writ of certiorari, this Court will not merely review rulings of law without a demonstration that the supposed errors are in conflict with the decisions of this Court or with those of other Circuits. Rather, certiorari will be granted only for the grounds stated either in Rule 19 or in prior decisions of the Court. Petitioner has not demonstrated that any such grounds exist for the granting of a writ of certiorari. Petitioner cites no question of general importance, only limited issues of rulings of law which he fails to demonstrate are at variance with other Circuits or with the rulings of this Court.

CONCLUSION

For the reasons and authorities cited above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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